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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

No. _____

MARIA DEL ROSARIO C. FRAIRE,
Individually and as Next Friend for
MYRA FRAIRE and JUAN ANTONIO FRAIRE,
Minor Children, and
JOSEFA ESQUIVEL FRAIRE, Petitioners
v.
CITY OF ARLINGTON and
JAMES W. LOWERY, JR., Respondents

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

LAWRENCE L. MEALER*
Attorney at Law
404 Mutual of Omaha
Building
6263 Harry Hines
Boulevard
Dallas, Texas 75235
TEL (214) 634-0771
FAX (214) 634-0465

CHARLES MONTEMAYOR
MONTEMAYOR & MONTEMAYOR

COUNSEL FOR PETITIONERS

*Counsel of Record

QUESTIONS PRESENTED

I. Can a Defendant, in an action brought under 42 USC 1983, based on allegations of an unlawful seizure through the use of excessive and deadly force in violation of the Fourth Amendment, utilize the doctrine of qualified immunity to dismiss the Plaintiff's claims, and if so, did the Fifth Circuit properly apply the doctrine within the context of the Defendant's Motion for Summary Judgment?

II. Can evidence of an unlawful seizure through the use of excessive and deadly force in violation of the Fourth Amendment serve to impose liability on a municipality in an action brought under 42 USC 1983 either through the doctrine of ratification or as some evidence of the existence of constitutionally deficient policies or procedures?

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**PETITION FOR WRIT OF CERTIORARI
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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

MARIA DEL ROSARIO C. FRAIRE, Individually and as Next Friend for MYRA FRAIRE and JUAN ANTONIO FRAIRE, Minor Children and JOSE ESQUIVEL FRAIRE, Petitioners herein, pray that a writ of certiorari issue to review the judgment of

the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on April 10, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 957 F.2d 1268 (5th Cir. 1992) and is printed in Appendix A hereto infra, page 23. The decision of the United States District Court for the Northern District of Texas is printed in Appendix C hereto, infra, page 25. The judgment for the United States Court of Appeals for the Northern District of Texas is printed in Appendix D hereto, infra, page 26.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 10, 1992. (Appendix A, infra, page 23). A timely

petition for rehearing was denied on May 7, 1992 (Appendix B, infra, page 24). The jurisdiction of the Supreme Court is invoked under 28 USC Section 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

42 USC 1983 states in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Fourth Amendment to the United States Constitution states, as follows:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This action brought under 42 USC 1983 arises from the death of JAVIER FRAIRE ("Fraire"), who was chased, shot and killed by a plainclothes police officer in an unmarked vehicle because the officer claims he was suspected of driving while intoxicated. The Petitioners presented competent summary judgment evidence that during the entire chronology of the case up to and including the shooting, the officer never displayed any identification

or properly identified his status as a law enforcement officer with the Arlington, Texas Police Department.

On the date of the incident, Fraire was accompanied by a friend, JOSE RODRIGUEZ ("Rodriguez"). Rodriguez and the plainclothes officer who shot and killed Fraire, JAMES W. LOWERY, JR. ("Lowery") were the only witnesses to the entire chronology of events that culminated in the shooting. Rodriguez submitted a fact-specific affidavit attesting to the following chronology of events.

On Sunday, November 22, 1987, Fraire had picked Rodriguez up in his pickup truck. They had stopped at a convenience store to purchase some beer prior to driving to a soccer game to be held later that afternoon. After the purchase, they each opened a can of beer and then

proceeded to leave the convenience store making a right hand turn on Collins Street in Arlington, Texas. After making a proper turn into the farthest right-hand lane, Rodriguez heard a honk coming directly behind Fraire's truck. At that time, Rodriguez saw Fraire make a gesture with his right hand through the rear window of the pickup truck, obviously intended as a response to the honk to the vehicle immediately behind them. Fraire then picked up a chile pepper and waved it out the driver's side window with his left hand. It is undisputed that the vehicle and person behind Fraire at the time both gestures was made was Lowery, a plainclothes warrant officer driving an unmarked police car from the Arlington Police Department. At this time, according to Lowery and to radio

transcripts of the transmission on the date of the incident, the officer radioed for a marked police unit to come to his location for the purpose of stopping Fraire's pickup.[1] In obvious response to the close following of his vehicle by Lowery, Fraire made a right-hand turn off of Collins onto a residential street and then immediately turned into the first driveway on his left and stopped. Instead of continuing to proceed down Collins, like Fraire had obviously hoped, Lowery turned right onto the same residential

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[1] Although Lowery contends that the vehicle was driving erratically as it proceeded down Collins Street, Rodriguez' affidavit specifically contradicts those contentions. The opinion of the Fifth Circuit recited Lowery's version verbatim without noting that Rodriguez had specifically contradicted it. Texas law does, however, prohibit both drinking and driving, Tex. Rev. Stat. Ann. art 6701d, Sec. 107E (Vernon Supp. 1991).

street and parked his vehicle across the street from the driveway where Fraire had parked. After Lowery stopped, he advised the dispatcher of his location, opened the door and got out of his vehicle. At this point in time, before Lowery ever crossed the street, Fraire backed out of the driveway and proceeded down the residential street with Lowery in pursuit.[2]

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[2] As the Fifth Circuit opinion details at some length, Lowery states that he crossed the street, showed his identification and engaged in conversation with both of the occupants at the first stop. In his affidavit, Rodriguez specifically denied Lowery's version as follows:

> "He did not exhibit a badge. There was no conversation either between officer Lowery, Javier Fraire, or myself, as he never got close enough to engage in any conversation. As soon as Javier saw that the man was beginning to walk toward him, he put the

At this point in time, Lowery continued the chase and radioed that the pickup truck was proceeding down a dead end street. When the pickup approached an "L" intersection, Fraire failed to negotiate the left turn and went into a residential yard. As Fraire backed out of the yard, Lowery stopped his vehicle and radioed that the truck was trying to hit his car. When Fraire's pickup reentered the street he proceeded forward to the

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> truck in reverse, backed out of the driveway with the rear of the truck moving toward Collins, put the car in drive and passed the vehicle driven by Lowery. At the time we passed his vehicle, Lowery was already back in his car. The statement he makes in his affidavit in regard to a display of the badge and a conversation between Lowery and Javier is not true." (TR3, pp 559-560).

first street on his left, which he obviously didn't recognize to be a cul de sac. As he made the left turn, Lowery's vehicle was in pursuit behind him. Although prior to this time, there were no witnesses to this incident other than the occupants of the two vehicles, there were at least eight eyewitnesses who lived in and around Creekmere Court (the cul de sac) who gave statements to the Arlington, Texas Police Department as to what transpired next. All of these witnesses' statements and Rodriguez' statements are substantially similar in describing an effort by Fraire to circle and exit the cul de sac. After Lowery entered Creekmere Court, he parked his unmarked vehicle and exited it while pulling out his nine millimeter revolver. Rodriguez states that Lowery "had walked out from

the right side of his car in what I thought was an effort to block Javier's exit from the circular street. At no time while we were in the circular street did I see Lowery show a badge. I never realized that Lowery was a police officer until I heard him ask for assistance on his car radio." As Javier proceeded to exit the cul de sac in his pickup, he approached the position where Lowery was standing with his drawn revolver. Most of the eyewitnesses heard Lowery yell something, but with the noise from the screeching tires, no one could identify exactly what he had said. As the truck approached the exit and got nearer to where Lowery was standing, he fired one shot from his nine millimeter pistol which hit Fraire in the middle of the forehead, causing the pickup truck to veer to the left and run into a

tree. Fraire died shortly thereafter from the wound.

On the date of the shooting, Section 317.05 of the General Orders of the Arlington, Texas Police Department prohibited the discharging of firearms in any misdemeanor case unless in defense of life and prohibited further shooting "at a moving or fleeing vehicle except in defense of an officer's life or another person's life and all other reasonable means of defense have failed." (TR1, p106). Although Lowery's version of what transpired on Creekmere Court can be said to have constituted a compliance with this regulation, his version of the facts is contradicted not only by Rodriguez, but by every other eyewitness to the occurrence. According to Lowery, he never walked into the center of the cul de sac for the

purpose of stopping Fraire's vehicle. According to Lowery, he hid behind the rear of his vehicle, using it as a shield as he prominently displayed his badge and repeatedly identified himself as a police officer. He denies that Fraire ever attempted to leave the cul de sac; instead, he describes two separate and distinct attempts by Fraire to ram his truck into Lowery's vehicle while he hid behind it as a shield:

> As I reached my car, Fraire had backed up all the way across to the other side of the cul de sac, had put the car in drive, gunned the engine and began to drive directly at the center of my car. At this time, I believed that Fraire was going to hit me or smash my car into me. When he was only about three feet away from me, Fraire stopped the truck. At this time, I did not know whether he was trying to hit my car, disable my vehicle or run me down. However, I feared for my life and believed that he was either trying to hit me or trying to ram my car into me. I therefore withdrew my pistol from the holster and

> stepped back behind my car, using the corner of it as a shield in case he tried to hit me. By this time I believed that marked units were likely in route and had decided that I would simply let the truck pass me by without trying to stop it. (TR1, p278)

Lowery then describes the truck backing up and making a second intentional assault on himself and his vehicle as he hid behind it. He states that he held his badge open in his left hand as he fired one shot from his weapon in his right hand to prevent Fraire from hitting his automobile or running him over with it.

It has always been the contention of the Petitioners that Lowery manufactured his version of the incident on Creekmere Court in order to place himself in compliance with regulations that he was prohibited from firing at a moving vehicle unless in self-defense and all other means

of defense have failed. Although there is some variation in each of the statements by the eight eyewitnesses who live in and around Creekmere Court, their versions of events contradict Lowery's in each of the following respects:

1) None of the eyewitnesses make any mention of Lowery ever exhibiting a badge while on Creekmere Court;

2) None of the accounts describe Lowery hiding behind the rear of his vehicle;

3) None of the statements of the eyewitnesses contain any description which would comport with an intentional assault on Lowery as he hid behind his vehicle;

4) All of the accounts place Lowery holding his gun in both hands as he stood in Creekmere Court away from his car in an obvious effort to block the exit of

Fraire's pickup.

In accordance with Arlington policy, an internal affairs investigation was initiated on the date of the incident and was later reduced to written form. The investigation contained transcripts of interviews with both Lowery and Rodriguez as well as written statements made by the eight witnesses on Creekmere Court. Although the report detailed the version of the incident as accounted by Lowery, it made no mention of any discrepancies between his version and those of the eyewitnesses and Rodriguez. It did describe that Lowery stated that he never intentionally put himself in front of the truck but had utilized his car as a shield because he was afraid the truck was trying to hit him (TR3, p585). Yet the report concludes that "Officer Lowery got out of

his car on Creekmere to try to stop the pickup truck driven by Javier Fraire. He went out into the court away from his car... and at the time he fired the pickup truck was only 8-12 feet away from the officer and headed directly toward him." (TR3, p587-588). In other words, the City of Arlington's own internal affairs reports repudiated the version given by Lowery which version was obviously concocted for the purpose of showing that he had complied with the prohibition against shooting moving vehicles unless all other means of defense had failed. Although he was criticized for "tactical errors," he was exonerated by the internal affairs investigation as well as the Chief of Police of the City of Arlington, who reviews every such report and has ultimate authority to discipline any officer.

Three months after the incident made the basis of this action, Section 317.05 of the General Orders of the Arlington Police Department were amended to read as follows:

> (g) Officers will not discharge a firearm at or from a moving vehicle except when:
>
> 1. the suspect is using deadly force against the officer or others by means other than the vehicle; or
>
> 2. all other means of reasonable means have failed.
>
> Officers will not voluntarily or recklessly place themselves in a position in front of an oncoming vehicle where deadly force is a likely outcome. The authorization to use deadly force ceases when the vehicle is no longer a threat.

The Petitioners initially brought this action into state court but it was properly removed to the United States District Court for the Northern District of Texas. Respondent Lowery filed a

Motion for Summary Judgment relying on the doctrine of qualified immunity and attached his affidavit as supporting documentation for his motion. The City of Arlington filed its Motion for Summary Judgment relying, in part, on an affidavit from the Chief of Police that it is his role to review all internal affairs investigations and to exonerate or punish Arlington Police Officers as a result of such incidents. The District Court granted both motions for summary judgment and dismissed the Petitioners' constitutional claims. By opinion dated April 10, 1992, the United States Court of Appeals affirmed. Relying heavily on Lowery's affidavit and disregarding Rodriguez' claims that Lowery was attempting to block Fraire's exit from the cul de sac, the court concluded that

Lowery "does not appear to have been trying to hinder Fraire's escape," 957 F.2d at 1278. The court affirmed the District Court's ruling that Lowery was entitled to qualified immunity in the context of the law as it existed at the time of the incident in question. Thus, the court analyzed Lowery's actions in the context of Shillingford v. Holmes, 634 F.2d 263 (5th Cir. 1981). The court did not reference Rodriguez' affidavit but did refer to a statement he had given the police after the incident when he was asked whether Fraire's truck was going to hit Lowery and he responded "it was close." The court then noted that this statement was made by Rodriguez "in his hostility." [3] Although the court conceded

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[3] Although the Fifth Circuit panel attempted to disparage Rodriguez' account of the accident as a result of his

that Lowery may not have followed established police procedures by displaying his badge and identifying himself while in plainclothes, it held he was still entitled to qualified immunity under the Shillingford standard and affirmed the dismissal of Petitioners' claims against Lowery on the grounds of qualified immunity. In addition, the court affirmed the District Court's dismissal of Petitioners' claims against the City of Arlington on the basis that allegations of an isolated incident are not sufficient to show the existence of a constitutionally deficient custom or policy. As to the Petitioners' claim that

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"hostility" to Lowery's version of events, the City of Arlington dismissed outstanding traffic tickets as a result of his cooperation with the police department after the incident.

the City of Arlington was aware that Lowery was not telling the truth in describing the incident on Creekmere Court, the court concluded that any such discrepancies were "relatively minor" and might be produced in "the tension and heat of the pursuit and the element of surprise in such a stressful situation", 957 F.2d at 1281. Ruling that the Petitioners have provided no evidence that Arlington had either ratified the use of unlawful and excessive force or maintained constitutionally deficient policies or procedures, it dismissed the Petitioners' claim against the City.

The Petitioners timely filed a Petition for Rehearing which was overruled by order dated May 7, 1992.

REASONS FOR GRANTING WRIT

I. Can a Defendant, in an action brought under 42 USC 1983, based on allegations of

an unlawful seizure through the use of excessive and deadly force in violation of the Fourth Amendment, utilize the doctrine of qualified immunity to dismiss the Plaintiff's claims, and if so, did the Fifth Circuit properly apply the doctrine within the context of the Defendant's Motion for Summary Judgment?

A. Certiorari should be granted to resolve conflicts among the circuits.

In Graham v. Connor, 490 US 386, 109 S. Ct. 1865, 104 L.Ed.2d 443 (1989) this Court held that claims that law enforcement officials have used excessive force -- whether deadly or not -- in the course of an arrest, investigatory stop, or other seizure of a free citizen should be analyzed under the Fourth Amendment and its standard of objective reasonableness, but left open the question as to whether or not the doctrine of qualified immunity was available to the law enforcement officer in defending his conduct, Id, note

12, 109 S. Ct. at 1873. Prior to Graham, courts had analyzed such cases as a violation of either substantive due process under the Fourteenth Amendment, which prohibits egregious conduct that shocks the conscience, or under the Fourth Amendment. Those courts considering substantive due process claims would not consider whether a police officer could properly assert the defense of "good faith" or qualified immunity because such conduct per se was without justification. Those courts that utilized the Fourth Amendment in analyzing excessive force claims were divided as to whether qualified immunity could be raised by the law enforcement officer in defense of the claim. Many courts ruled that qualified immunity is not available to immunize the defendant because laws clearly establish

that the use of excessive force is unlawful see, e.g., Robinson v. Bibb, 840 F.2d 349, 351 (6th Cir. 1988); Fernandez v. Leonard, 784 F.2d 1209, 1217 (1st Cir. 1986); Stevens v. Corbell, 832 F.2d 884, 890 (5th Cir. 1987); Vizbaras v. Priber, 761 F.2d 1013, 1018-1019 (4th Cir. 1985) (Winter, J., concurring and dissenting), cert den'd 474 U.S. 1101 (1986); Clark v. Beeville, 730 F.2d 739, 740 (11th Cir. 1984); Stanulonis v. Marzec, 649 F.Supp. 1536, 1545 (D.Conn. 1986); Patzner v. Burkett, 779 F.2d 1363, 1370 (8th Cir. 1985)(allowing qualified immunity as to warrantless arrest but not to excessive force claim).

Other pre-Graham courts have ruled that qualified immunity is a defense to a Fourth Amendment claim alleging unnecessary force during an arrest, see,

e.g., Whitt v. Smith, 832 F.2d 451, 452-454 (7th Cir. 1987); White v. Pierce County, 797 F.2d 812, 816 (9th Cir. 1986); Acoff v. Abston, 762 F.2d 1543, 1548-50 (11th Cir. 1985); Varella v. Jones, 746 F.2d 1413, 1418 (10th Cir. 1984); Bauer v. Norris, 713 F.2d 408-411 (8th Cir. 1983); Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 456 F. 2d 1339, 1347 (2nd Cir. 1972).

The decision in Graham did nothing to resolve the conflicts among the circuits. In Dixon v. Richer, 927 F.2d 1456 (10th Cir. 1991), the court held that in excessive force claims asserted under the Fourth Amendment, the qualified immunity question is always answered within the Fourth Amendment inquiry because "in the excessive force context, the Fourth Amendment inquiry asks directly whether

the police officer reasonably could have believed that the force was necessary under the circumstances...This is not a circumstance where the officers relying on the probable cause determination of a magistrate. The police officer is the sole actor whose subjective reasonableness is at issue." Id., 922 F.2d at 1463. See also Street v. Parham, 929 F.2d 537, 540-41 (10th Cir. 1991). In Jackson v. Hoylman, 933 F.2d 401, 403 (6th Cir. 1991), the court affirmed a district court holding that qualified immunity is not available in an excessive force case because the issue "turns on the same objective reasonableness standard that the claim of excessive force turns on..." In Hunter v. District of Columbia, 943 F.2d 69, 77 (D.C. Cir. 1991), the court held that "(w)e too doubt whether a

substantively distinct qualified immunity defense would be available to an officer acting after Graham..." Other courts continued to allow law enforcement officers to raise the doctrine of qualified immunity in excessive force cases, see, e.g., Finnegan v. Fountain, 915 F. 2d 817, 822-823 (2nd Cir. 1990); Brown v. Glossip, 878 F.2d 871, 873-874 (5th Cir. 1989)

B. Certiorari should be granted because those courts that recognize qualified immunity in excessive force claims are uncertain as to what standard to apply separate and apart from the Graham criterion of objective reasonableness.

Although the court in Finnegan v. Fountain, 915 F.2d 817 (2nd Cir. 1990) recognized the defense of qualified immunity in an excessive force case, it noted what it characterized as a

"doctrinal tension" in the case law by the failure of this court to explain "how the two standards of reasonableness under the claim and the defense differ from each other," Id, note 11 at 824. Several courts, in analyzing excessive force cases for behavior occurring prior to Graham have continued to apply substantive due process analysis in analyzing the defense of qualified immunity to determine the clearly established right of which a reasonable officer would have been aware before the decision in Graham, see, e.g., Mouille v. Live Oak, 918 F.2d 548, 551 (5th Cir. 1990); Chathas v. Smith, 884 F.2d 980, 989 (7th Cir. 1989); Hannula v. Lakewood, 907 F.2d 129, 131-32 (10th Cir. 1990).

This is exactly what the Fifth Circuit panel did in this case. The Shillingford

standard utilized by the Fifth Circuit was a tripartite test founded upon the Fourteenth Amendment's concept of substantive due process, Brown v. Glossip, 878 F.2d 871, 872 (5th Cir. 1989). Hence the court determined that Shillingford was the "clearly established law at the time of the incident made the basis of this action." The Petitioners not only had to overcome an objective reasonableness claim in seeking liability but also a substantive due process defense in circumventing the qualified immunity question. This is a perversion of the decision in Graham.

C. This court should grant certiorari because the rationales underlying qualified immunity for public officials are not applicable to law enforcement officers accused of excessive and deadly force in violation of the Fourth Amendment.

In Wyatt v. Cole, _____ US _____, 118

L.Ed.2d 504 (1992), the Court refused to expand the doctrine of qualified immunity to private parties being sued under 42 US 1983 because the rationales underlying the doctrine were not transferable to those defendants. The policies underlying qualified immunity are to preserve the ability of governmental officials to serve the public good and not be deterred by the threat of damage suits with little or no merit. Its purpose is to safeguard government and the public at large and not to insulate its agents.

Law enforcement officials are and should be aware that the use of excessive and unreasonable force could subject them to civil liability. As a result, policies and rationales underlying the qualified immunity doctrine are not transferable to law enforcement officials accused of such

action.

D. This court should grant certiorari because the standard for qualified immunity in excessive force cases under the Fourth Amendment is exactly the same as the standard enunciated in Graham.

The standard for liability in excessive force cases as established in Graham is and should be identical to the standard for qualified immunity. One commentator, after reviewing Fourth Amendment excessive force cases and the standard for qualified immunity, has concluded as follows:

> In applying the current standard for qualified immunity to excessive force claims alleging a violation of the Fourth Amendment, courts should recognize that qualified immunity is an unnecessary defense because the standard for qualified immunity is identical to the Fourth Amendment standard for liability. Both the general principle of law and the contours of the Fourth Amendment right to be free from excessive force are established; the Fourth Amendment prohibits unreasonable force, and it questions whether a reasonable officer would have believed the force was necessary.... Courts should recognize that when

> the fact finder determines the issue of liability under the Fourth Amendment, it automatically determines the issue of qualified immunity, Urbonya, "Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force" 62 TEMPLE LAW REV. 61, 115-116 (1989).

II. Can evidence of an unlawful seizure through the use of excessive and deadly force in violation of the Fourth Amendment serve to impose liability on a municipality in an action brought under 42 USC 1983 either through the doctrine of ratification or as some evidence of the existence of constitutionally deficient policies or procedures?

A. Certiorari should be granted to resolve conflicts among the lower courts.

Certainly it is clear that the doctrine of respondeat superior is not available to a claimant in seeking to impose liability on a governmental unit as a result of misconduct by its employees, Monell v. Dept. of Social Services, 436 US 658, 691 (1978). This Court has ruled that municipal liability can be imposed on

actions for which the municipality is actually responsible and thus such liability may be imposed for a "single decision by municipal policy makers under appropriate circumstances", Pembaur v. Cincinnati, 475 US 469, 479-480 (1986). The Court made clear that municipal liability would attach only where the decision maker possess final authority to establish municipal policy with respect to the action ordered, Id. 475 US at 483.

Some courts have held that a city's custom or policy authorizing or encouraging police misconduct cannot be inferred in its decision not to discipline an officer for a single incident of constitutional illegality, see, e.g., Santiago v. Fenton, 891 F.2d 373, 380-382 (1st Cir. 1989); Batista v. Rodriguez, 702 F.2d 393, 397-398 (2nd Cir. 1983);

Harris v. City of Pagedale, 821 F.2d 499 (8th Cir. 1986)cert den'd 484 US 986 (1987); Davis v. City of Ellensburg, 869 F.2d 1230, 1233-1235 (9th Cir. 1989); Depew v. City of St. Marys, 78 F.2d 1496, 1499 (11th Cir. 1986).

Other courts have imposed municipal liability as a result of one incident as either evidence of a defective policy or procedure or as authorization or ratification of the unconstitutional conduct, see, e.g., Grandstaff v. City of Borger, Texas, 767 F.2d 161, 171 (5th Cir. 1985), cert den'd 480 US 916 (1987)("the disposition of the policy maker may be inferred from his conduct after the events of that night. Following this incompetent and catastrophic performance there were no reprimands, no discharges and no admissions of error"); McRorie v. Shimoda,

795 F.2d 780, 784 (9th Cir. 1986)("policy or custom may be inferred, if after the shakedown, the prison officials took no steps to reprimand or discharge the guards, or if they otherwise failed to admit the guard's conduct was in error"); Slakan v. Porter, 737 F.2d 368, 372 (1984)("liability in this context is not premised on respondeat superior ... but on a recognition that a supervisory indifference or a tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries they inflict to those committed to their care"). This court should grant certiorari to resolve the conflicts existed among the circuit courts as they pertain to the imposition of municipal or governmental authorization or ratification of unconstitutional conduct.

B. This court should grant certiorari because a municipality's failure to objectively and impartially investigate the conduct of its own employees as it pertains to the utilization of excessive and unreasonable force should entail the potential for civil liability.

This court has already ruled that subsequent conduct may prove discriminatory motive in a prior employment decision, McDonell Douglas Corp. v. Green, 411 US 792, 802 (1973) and that subsequent acts may tend to prove the nature of prior conspiracy, Anderson v. United States, 417 US 211, 219 (1974). Thus, subsequent acceptance of dangerous and reckless conduct by the policy maker would tend to prove a pre-existing disposition and policy, Grandstaff v. City of Borger, 767 F.2d 161, 171 (5th Cir. 1985) or a ratification or authorization of that conduct.

In this case, the City of Arlington put

into issue the internal affairs investigation of the shooting of Javier Fraire. The Chief of Police, who promulgates all orders, rules and regulations for the police department, signed an affidavit stating that the internal affairs division "performed a thorough, detailed investigation of the circumstances surrounding the shooting." He continued:

> I have reviewed the statement of Officer James W. Lowery, Jr. and the statements of the witnesses who live near the scene of the incident and witnessed the shooting. Based on these statements, Officer Lowery did not violate any of the Arlington Police Department's General Orders or engage in misconduct, and I have not imposed any discipline on him as a result of that incident. (TR1,pp65-75)

Despite this testimony, it is clear that the internal affairs report itself reflects the fact that Lowery was not

telling the truth when he described the shooting on Creekmere Court. It is clear that Lowery manufactured a scenario in which he could say that he complied with the policy prohibiting the shooting of a vehicle unless "in self-defense when all other defenses have failed." Although the Fifth Circuit's opinion describes difference versions as "minor factual discrepancies... far too petty to constitute genuine issues of material fact", it is clear that the two versions can not be reconciled and that the internal affairs report itself serves to refute Lowery's veracity in what transpired.

When any law enforcement agency assumes within its responsibility the obligation to investigate and discipline itself, it must recognize and appreciate the

institutional forces of self-protection and preservation that serve to subvert that role. Therefore, the potential for the imposition of civil liability could serve not only as an incentive to properly accomplish lawful objectives but also to strengthen the integrity of our system of law enforcement.

CONCLUSION

WHEREFORE, Petitioners pray that a writ of certiorari issue from this honorable court to review the judgment of the United States Court of Appeals for the Fifth Circuit. In the event that the petition is granted, the Petitioners pray that judgment of the court below be reversed, that the cause by remanded to the District Court for trial on the merits.

Respectfully submitted,

LAWRENCE L. MEALER
ATTORNEY AT LAW
TBN 13886600
404 Mutual of Omaha Building
6263 Harry Hines Boulevard
Dallas, Texas 75235-5227
TEL (214) 634-0771
FAX (214) 634-0465

CHARLES MONTEMAYOR
TBN 14282300
MONTEMAYOR & MONTEMAYOR
404 Mutual of Omaha Building
6263 Harry Hines Boulevard
Dallas, Texas 75235-5227
(214) 634-0771
FAX (214) 634-0465

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed postage prepaid, certified mail, return receipt requested to counsel for James W. Lowery Jr., Ernest E. Figari, Jr. and Gary E. Eisenstat, FIGARI & DAVENPORT, 4800 NCNB Plaza, 901 Main Street, Dallas,

Texas 75202 and counsel for the City of Arlington, Mr. Gregory S. Norris and Mr. Robert E. Diaz, Assistant City Attorneys, City of Arlington, Texas, Box 231, Arlington, Texas 76004-0231 on this the 26th day of August, 1992.

LAWRENCE L. MEALER

92-393

Supreme Court, U.S.
FILED
AUG 5 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

No. _____

MARIA DEL ROSARIO C. FRAIRE,
Individually and as Next Friend for
MYRA FRAIRE and JUAN ANTONIO FRAIRE,
Minor Children, and
JOSEFA ESQUIVEL FRAIRE, Petitioners
v.
CITY OF ARLINGTON and
JAMES W. LOWERY, JR., Respondents

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI**

APPENDIX A

Opinion of the United States
Court of Appeals for the Fifth Circuit
of April 10, 1992

APPENDIX A

Maria Del Rosario C. Fraire, Individually and as Next Friend for Myra Fraire and Juan Antonio Fraire, Minor Children, and Josefa Esquivel Fraire, Plaintiffs-Appellants

v.

City of Arlington and James W. Lowery, Jr., Defendants-Appellees

No. 91-1597
Summary Calendar

United States Court of Appeals,
Fifth Circuit.

April 10, 1992
Rehearing Denied May 7, 1992

Argued before JONES, DUHE, and WIENER, Circuit Judges.

WEINER, Circuit Judge:

In this 42 USC Section 1983 action, the Plaintiffs-Appellants, successors of the late Javier Fraire (Fraire), appeal from the decision of the district court dismissing their claims against Defendants-Appellees, police officer James W. Lowery,

Jr. (Lowery) and the City of Arlington, Texas (Arlington), for Lowery's alleged use of unconstitutionally excessive force in the shooting death of Fraire. Agreeing with the district court that Lowery was qualifiedly immune, and that the Plaintiffs failed to plead their claims against Arlington with sufficient particularity or to present summary judgment evidence to place material facts in issue, we affirm.

I.

FACTS AND PROCEEDINGS

Almost all excessive force cases are very fact intensive; this one is certainly no exception. And, although there are differing versions of some of the facts in this case, the discrepancies do not rise to the level of genuine issues of material fact. Our decision today is not dependent on the resolution of those discrepancies.

We do, however, acknowledge our duty in the context of summary judgment, to view the facts in the light most favorable to the nonmovants - here the Plaintiffs. Moreover, when there are discrepancies between versions of the facts, we shall note them.

A. Operable Facts

Early on a Sunday afternoon, Lowery, a warrants officer for the Arlington police department, was driving on a major road in that city. He was driving an unmarked police car and was dressed in plain clothes.

In front of Lowery, a pickup truck turned onto the road from the parking lot of a convenience store on the east side of the street. As the pickup entered the thoroughfare, it made an extremely wide right turn, swinging into the inside lane,

and nearly colliding with oncoming traffic. Someone (not Lowery) honked at the pickup, in response to which the driver stuck his hand out of the window and made a "familiar gesture." Their truck was traveling in the same direction as Lowery, who noticed that each of its two occupants, both male, held an open can of beer in his hand.[1] The driver was Fraire and the passenger was Jose Rodriguez. Lowery followed the pickup for about one-half mile. He observed that Fraire failed to maintain a single lane of traffic, often swerving into other lanes. Lowery called his dispatcher, provided a description of the truck and its license number, and requested that a marked patrol car stop the truck.

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[1] Tex.Rev.Civ.Stat.Ann. art 6701d, Section Section 107E (Vernon supp. 1991) prohibits drinking and driving.

Just as Lowery completed his first radio request for assistance, Fraire made a sudden right turn off the main road onto a residential street, then turned immediately into the driveway of the first residence and stopped without any prompting from Lowery. Following Fraire onto the side street, Lowery stopped across the street. As Rodriguez told the police in an interview he gave shortly after the incident, Fraire stopped in the driveway in an attempt to trick Lowery into believing that Fraire was going into the garage of the house where they had stopped. Lowery advised his dispatcher of the location where he and the suspects had stopped and that he intended to speak with the occupants of the truck.

Lowery states that at that point he removed his badge from his belt, placed it face open in his hand, and showed it to Fraire and Rodriguez. He also orally identified himself as a police officer and then approached the truck. As Lowery reached the passenger's side of the truck, he reidentified himself as a police officer. Lowery saw that Fraire had an open can of beer, which he then put on the floor. Lowery identified himself for a third time as a police officer and told Fraire to put the truck in park and turn off the ignition. Fraire then stated, "I am sorry, I didn't mean to do it. It won't happen again, I promise." Lowery repeated his request for Fraire to park the truck and turn off the ignition. Instead, Fraire put the truck in reverse and backed it out of the driveway. Rodriguez denied that

this conversation ever took place.[2]

Faire sped down the side street into the residential neighborhood. Lowery returned to his car, and radioed the dispatcher again. Believing that the side street was a dead end, Lowery followed Fraire slowly. As he drove, Lowery continued to advise the dispatcher of his location. Fraire continued to pull away from Lowery and when the truck rounded the crest of a small hill, Lowery momentarily lost sight of it. Rodriguez recalled that about this time Fraire turned to Rodriguez and admitted that he had had legal problems with a "DWI."[3] Fraire asked Rodriguez to

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[2] Police dispatch records indicate that less than 30 seconds elapsed between the time that Lowery radioed that he had stopped to the time that he radioed that he was on the move again.

[3] Fraire was on probation for a prior conviction for driving while intoxicated. When Rodriguez was questioned

drive the pickup, which Rodriguez declined to do.

Seconds later, Lowery's car reached the top of the small hill, just in time for Lowery to see that Fraire, who was now driving so fast that he could not negotiate the turn at the bottom of the hill, had slammed the truck against the curb and skidded several feet up onto a lawn. As Rodriguez told police immediately after the incident, once the truck had stopped on the lawn, "I also recall that he [Fraire] was scared and he told me to throw a beer

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by the police investigators following the accident, he was asked whether Fraire knew that Lowery was a police officer. Rodriguez responded, "I think so because in the manner he was scared." Later, when asked how Fraire knew that Lowery was an officer, Rodriguez said, "I really don't know maybe because of the vehicle." In his affidavit, Rodriguez claimed not to have known that Lowery was a police officer until after the shooting occurred.

away."

Lowery believed that the truck had wrecked and so advised his dispatcher. But when Lowery was only about 50 feet away from where the truck was stopped, Fraire put the truck in reverse and backed toward Lowery's car, nearly ramming it. Again, Fraire sped off.

Lowery followed Fraire down the residential street to its intersection with a cul-de-sac. Fraire turned. Just as Lowery reached the intersection, Fraire, who had apparently not realized that the cul-de-sac was a dead end, skidded to a stop, again striking the curb and causing the truck to die. Lowery slowly pulled into the cul-de-sac and parked his car about 25 to 30 feet away from Fraire a few feet away from the left side of the curb without, however, blocking the entrance to

the street with his car.

After advising the dispatcher of his new location, Lowery left his car on foot and walked around to the passenger side. Lowery says that he pulled his badge and held it up in his left hand, face open, so that it was visible to Fraire and Rodriguez and yet again identified himself as a police officer. A number of eye-witnesses recalled Lowery's oral identification, though none saw him display his badge. Rodriguez claims that he never saw Lowery display a badge and that he did not know Lowery was a police officer until after the incident. Nevertheless, Fraire re-started the truck and began to drive away.

Lowery stated that after yelling, "Stop, Police Officer" or essentially identical words several times, and seeing that Fraire was indeed not stopping as he

continued around the cul-de-sac, Lowery retreated to the relative safety of the rear of his car. But witnesses on the scene place him several feet away from his car, toward the middle of the street. Lowery insists that he was not blocking the entrance of the cul-de-sac, and that it would not have been difficult for Fraire to drive past him.

The following passage is an eye-witness description of what transpired next:

> He [Lowery] was standing about ten feet or so away from the passenger side of his detective car. By this time the truck had gone to the end of the court and had turned back around heading toward the detective. The truck was still going fast and squealing its tires. The truck was heading right toward the detective and it looked like the driver of the truck was trying to run over the detective with the truck. I saw the detective shout "hault" (sic). I couldn't hear what else the detective might have said for the noise of the truck and the squealing of the tires of the truck. The detective didn't shoot at first. He stood there for a while with his gun pointed at the

> truck while the truck was still headed right for the detective at a fast speed. The truck got closer and closer to the detective and the detective shot his gun one time at the truck when the truck was about ten or fifteen feet away from the detective. The truck was going to run right over the detective if the detective didn't do something and I don't know if the detective would have had time to even jump out of the way or not because the truck was going so fast and was so close to hitting the detective. After the detective shot at the truck, the truck lost control and changed directions so that the truck didn't run over the detective. The truck jumped a curb and went up into somebody's yard and hit a tree and stopped.

Several other witnesses to the incident recalled that Lowery yelled "Stop, police," or "Halt, police," several times, that the truck headed straight for him such that they believed he was going to be run over, and that Lowery waited until the last possible moment before he pulled the trigger.

Lowery recalled that after he fired his weapon, he jumped to his left expecting to be hit by the oncoming truck. He states that he did not realize that his bullet had hit Fraire. After Fraire's vehicle veered to its left (Lowery's right) and ran up on the lawn of a house, Lowery ran to the truck and instructed the occupants to get out. Only when Rodriguez complied was it apparent to Lowery that Fraire was shot. Lowery instructed one of the bystanders to call 911 and the police dispatcher on Lowery's car radio. Fraire later died of a gun shot wound to the head.

The Arlington Police Department conducted an internal affairs investigation of the incident, and exonerated Lowery of the allegation that he used excessive force. The report of the investigation found that "Officer Lowery was within the

Texas Penal Code and the City of Arlington's use of force police to use deadly force to protect himself and effect the lawful arrest. A review of Officer Lowery's actions show no policy violations, however, there were tactical errors that might have possibly effected [sic] the outcome of the incident." Specifically, the investigation found that there was never any need for Lowery to follow the truck into the subdivision because it was a dead end, and that there was never any need for Lowery to get out of his vehicle: "[W]hen he got out of his car and stood in the cul-de-sac, he invited the truck to aim for him." Lowery was not disciplined in any way for his actions.

B. Proceedings

The Plaintiffs originally filed this Section 1983 action in Texas State Court

alleging that Lowery deprived Fraire of his constitutional rights under the Fourth and Fourteenth Amendments by using deadly force in a situation in which such force was unwarranted. In addition, the Plaintiffs alleged that Arlington had failed to implement policies and procedures pertaining to the utilization of deadly force by plain clothes officers, and that such failure deprived Fraire of his constitutional rights.[4] The complaint was later amended to allege that Arlington ratified Lowery's acts through their investigation and exoneration of Lowery

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[4] The Plaintiffs also alleged that Lowery's conduct constituted negligence and gross negligence for which they sought to impose liability against Arlington under the Texas Tort Claims Act and the Texas Wrongful Death Act. The district court dismissed those pendent state claims, and the Plaintiffs do not challenge that decision on appeal.

because Arlington officials were aware that Lowery had not told the truth about how the shooting occurred.

Lowery and Arlington removed the action to the United States District Court. After discovery, Arlington and Lowery filed separate motions to dismiss, or in the alternative, for summary judgment. Lowery claimed the defense of qualified immunity.

The district court dismissed the Section 1983 action against Lowery. The court found that Lowery was qualifiedly immune in his individual capacity because

> [t]here is no summary judgment evidence that would support a conclusion that no reasonable officer, taking relevant factors into account, would have had the belief that his conduct was unlawful when responding as Lowery did. On the other hand, there is summary judgment evidence that leads to a conclusion that the actions Lowery took were actions that a reasonable officer could have believed lawful.

The court also dismissed all claims

against Arlington because the Plaintiffs had made only general accusations against the city and failed to plead with particularity, and because the Plaintiffs presented no evidence sufficient to counter Arlington's motion for summary judgment.

Finding that the district court did not err in dismissing the claims against Lowery and Arlington, we affirm.

II.

STANDARD OF REVIEW

As the district court considered summary judgment evidence in deciding these motions to dismiss or, in the alternative, motions for summary judgment, we must treat the decision as one for summary judgment.

This court reviews the grant of summary judgment motion de novo, using the same criteria used by the district court in the

first instance.[5] We "review the evidence and inferences to be drawn therefrom in the light most favorable to the non-moving party."[6] Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[7] Fed.R.Civ.P. 56(e) requires that when a proper motion for summary judgment is made, the non-moving party must set

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5 Walker v. Sears, Roebuck & Co., 853 F.2d 355, 358 (5th Cir.1988).

6 Baton Rouge Bldg. & Constr. Trades Council v. Jacobs Constructors, Inc., 804 F.2d 879, 881 (5th Cir.1986) (per curiam) (citing Southmark Properties v. Charles House Corp., 742 F.2d 862, 873 (5th Cir.1984)).

7 Fed.R.Civ.P. 56(c).

forth specific facts showing that there is a genuine issue for trial.[8] The mere allegation of a factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[9] "Material facts" are "facts that might affect the outcome of the suit under the governing law."[10]

III.

ANALYSIS

A. The Claims against Lowery

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[8] Id.; See Anderson v. Liberty Lobby, Inc., 477 U.S. 242,250, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

[9] Id. at 248, 106 S.Ct. at 2510.

[10] Id.

Lowery is a public safety official entitled to assert a qualified immunity defense,[11] and he did so. Substantively, qualified immunity shields government officials performing discretionary functions "from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated."[12] Whether a defendant asserting qualified immunity may be personally liable turns on the objective legal reasonableness of the defendant's actions assessed in light of

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11 See Gagne v. City of Galveston, 805 F.2d 558, 559 (5th Cir.1986), cert denied, 483 U.S. 1021, 107 S.Ct. 3266, 97 L.Ed.2d 764 (1987).

12 Anderson v. Creighton, 483 U.S. 635, 638, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987).

clearly established law.[13] The Supreme Court explained that when a plaintiff invokes a clearly established right, the appropriate inquiry is whether "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates the right."[14] If reasonable public officials could differ on the lawfulness of the defendant's actions, the defendant is entitled to qualified immunity.[15] Thus, when a defendant's conduct actually violates a plaintiff's constitutional rights, the defendant is entitled to qualified immunity if the conduct was

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[13] See id., 483 U.S. at 639, 107 S.Ct. at 3038.

[14] Id. at 640, 107 S.Ct. at 3039.

[15] Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986).

objectively reasonable.[16]

The Plaintiffs allege that Lowery employed excessive force to effect an arrest.[17] The objective reasonableness of Lowery's conduct must be measured with reference to the law as it existed at the time of the conduct in question.[18] The conduct in question occurred in 1987. At

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[16] See Melear v. Spears, 862 F.2d 1177, 1188 (5th Cir.1989) (Higginbotham, J. concurring).

[17] Regardless of whether Lowery was attempting to, or at the very least intended to arrest Fraire, the Fourth Amendment prohibition against unreasonable searches and seizures is implicated because "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." Tennessee v. Garner, 471 U.S. 1,7, 105 S.Ct. 1694, 1699, 85 L.Ed.2d 1 (1985). See also Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

[18] See Harlow v. Fitzgerald, 457 U.S. 800, 818-19, 102 S.Ct. 2727, 2738-39, 73 L.Ed.2d 396 (1982).

that time, the standards set forth in Shillingford v. Holmes [19] were the clearly established law in this circuit with respect to excessive force in the context of the Fourth Amendment.

In Shillingford, we held that to maintain an excessive force claim a plaintiff must prove that the defendant's action caused severe injuries, was grossly disproportionate to the need for action under the circumstances and was inspired by malice rather than merely careless or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience....[20] In this case, Lowery is entitled to qualified immunity against the Plaintiffs' claims if a reasonable

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[19] 634 F.2d 263 (5th Cir. Unit A Jan. 1981).

[20] Id. at 265.

police officer could conclude that conduct such as Lowery's would not violate the right of a person such as Fraire to be free from excessive force as enunciated in Shillingford. [21]

There is no question that Fraire's injury was "severe." Moreover, if we determine that Lowery's acts were not "grossly disproportionate to the need for action under the circumstances," we need never reach the "malice" prong of Shillingford's conjunctive, tripartite test-force grossly disproportionate to that needed under the circumstances.

The Plaintiffs characterize this case as one in which Lowery employed excessive force to effect an arrest of a misdemeanant. In response, Lowery insists

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[21] See Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed. 271 (1986).

that, even as late as the time he entered the cul-de-sac, he had no intention of stopping Fraire to arrest him,[22] but was forced to shoot Fraire in self-defense because Fraire was attempting to run Lowery down with the pickup. Lowery's contentions are borne out by both his and Rodriguez' account of the "chase" and by the eye-witness accounts of the shooting. After Lowery entered the cul-de-sac and left his car, he was clearly in personal danger of being inured or killed. Statements of eye-witnesses included:

> "The truck was still moving and headed straight for the man in the blue car." "I heard the officer yell: halt. The truck was within a car length of the officer when he fired his gun." "I saw the man pull out a gun and yell, 'Police, stop!' The truck just kept coming right at him, and he fired the gun." "[H]e ordered the pickup to stop by saying, 'Police officer, halt!' The

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[22] Lowery had already called for a marked police car for that purpose.

tuck kept coming at him and accelerated [at] him. The officer had his gun drawn and he waited until the very last second before he fired. If he had waited any longer they would have run over him."

"The driver in the pickup started to pull forward, and the man in the Chevrolet pulled out a gun and yelled 'Stop' again. The driver of the pickup kept coming straight at him, and the man shot the driver."

"He drew his gun and yelled, 'Police, stop!' The pickup kept coming right at him, and at the last possible second the man fired."

In his statement to the police later that afternoon, Rodriguez was asked whether Fraire's truck was gong to hit Lowery. Even in his hostility he admitted, "It was close."

For the purposes of our inquiry under Shillingford, the question becomes not whether Lowery' actions were grossly disproportionate to the need for action in arresting Fraire for a misdemeanor offense but whether his action were grossly

disproportionate to the need to defend himself from attack. On one hand, the Plaintiffs have not offered any summary judgment evidence supporting their contention that Lowery's use of force in defending himself was grossly disproportionate to the need. On the other hand, the undisputed facts demonstrate conclusively that Lowery did not use force grossly disproportionate to this self defense need. Specifically, it is undisputed that Lowery observed Fraire and Rodriguez drinking and driving on the principal thoroughfare; that Fraire turned onto a residential street and pulled into the first driveway in an attempt to evade Lowery thought trickery; that when this ploy failed Fraire backed out of the driveway and sped down the residential street into the residential neighborhood;

that Fraire then crashed the truck, told Rodriguez to throw the beer out the window and backed up, nearly ramming Lowery's car; that Fraire then sped away and turned into the cul-de-sac, hitting the curb and killing the engine of the truck; that, instead of remaining stopped as lawfully ordered, he started the truck, turned around and headed out; and that, with Lowery on foot and yelling"Police, Stop!", Fraire drove straight at Lowery showing no sign of attempting to stop or drive around him. It was only at the moment when it became imminently clear to Lowery, as it was to the eye-witnesses, that Fraire was going to run Lowery down, that he fired a single shot in self-defense. Although all of the final action occurred in a matter of seconds, there can be no doubt that Lowery's action was one of virtual

instinctive self-preservation in no way related to his original concerns with the open container laws, a concern by then long since evaporated.

The question, then, is whether under these circumstances a reasonable officer could conclude that Lowery used force grossly disproportionate to need when he shot Fraire in the belief that Fraire was trying to kill Lowery or cause great bodily harm by running over him with the truck.

Our holding in Young v. City of Killeen [23] is instructive. In that case a police officer observed a drug transaction between Young and another person. The officer approached the suspects in his car with the light flashing. Young attempted to flee in his car, but the officer blocked Young's

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[23] 775 F.2d 1349 (5th Cir.1985).

path. The officer left his car and told Young to get out of his. When Young reached under his seat for what appeared to be a weapon, the officer shot and killed him. Under those facts, the court found that the actions of the officer were not excessive to the need. In so holding, the court stated that if Young's action gave the officer cause to believe that he was under a threat of serious harm, then the officer's use of deadly force was not a constitutional violation.[24]

Young is pertinent to the instant case for another reason. The Plaintiffs have charged that the force Lowery employed was excessive, at least in part because Lowery may not have followed established police procedures in displaying his badge and

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[24] Id. at 1353.

identifying himself while in plain clothes. The implication is that Lowery thereby manufactured the circumstances that gave rise to the fatal shooting.[25] We rejected a similar argument in Young. There, the district court found that the officer had acted negligently and contrary to good police procedure. On appeal, we noted that "[t]he sense in which [the district court] finds excessive force in that the force would have been avoided if [the policeman] had approached Young as required by proper police procedures."[26] We found to the contrary, however, that regardless of what had transpired up until the shooting

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[25] Of course, Lowery disputes this. He maintains that the prominently displayed his badge to Fraire and Rodriguez when the pair stopped in the driveway on the side street and when he exited his car in the cul-de-sac.

[26] Id. at 1352.

itself, Young's movements gave the officer reason to believe, at that moment, that there was a threat of physical harm. We said:

> The constitutional right to be free from unreasonable seizure has never been equated by the Court with the right to be free from a negligently executed stop or arrest. There is no question about the fundamental interest in a person's own life, but it does not follow that a negligent taking of life is a constitutional deprivation.[27]

We do not mean to imply that we in any way find Lowery's actions leading up to the shooting to be negligent. We merely explain that even a negligent departure from established police procedure does not necessarily signal violation of constitutional protection.

We are also guided by the Supreme Court's conclusion in Tennessee v. Garner

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[27] Id. at 1353.

28:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon ... deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.[29]

At the moment of the shooting, Lowery does not appear to have been trying to hinder Fraire's escape. Rather, as Lowery avers, he clearly appears to have been trying to prevent his own serious injury or death. Certainly then, because under the rationale

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[28] 471 U.S.1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985).

[29] Id, at 11-12, 105 S.Ct. at 1071. In Garner, the court found excessive use of force by a police officer who shot an unarmed fleeing felony suspect who posed no danger to the officer. The Plaintiffs urge that the result in Garner should dictate our decision here because Garner was a felony suspect and Fraire was only an unarmed misdemeanant.

of Garner Lowery could have used deadly force to prevent Fraire's escape, considering Fraire's actions leading up to the shooting[30] Lowery must have been justified in firing to prevent his own death or great bodily harm.

Finally, Lowery's actions cannot be viewed as grossly disproportionate because he acted well within his rights under Section 9.51(c) of the Texas Penal Code which governs the use of deadly force. This statute provides in pertinent part that:

> A peace officer is justified in using deadly force against another when and to the degree the peace officer reasonably believes the deadly force is immediately necessary to make an arrest, or to prevent escape after arrest, if the use of force would have been justified under Subsection (a) of this section and :

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[30] I.e., drinking while driving, erratic driving.

> (2) the actor reasonably believes there is a substantial risk that the person to be arrested will cause death or serious bodily injury to the actor or another if the arrest is delayed.[31]

Subsection (a) provides that the use of force is justified if (1) the police officer reasonably believes the arrest is lawful, and (2) before using force, the officer manifests his purpose to make an arrest and identifies himself as a police officer, unless he reasonably believes that this purpose and identity are already known by or cannot reasonably be made known to the arrestee.[32]

Here, Lowery satisfied the requirements of both subsections 9.51(a) and (c). Specifically, Lowery had probable cause to stop Fraire because Fraire was observed by

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[31]

[32] Id. Section 9.51(a).

Lowery to be drinking and driving. Lowery had more than a reasonable basis to believe that Fraire might cause death or serious bodily injury to himself or others based on the facts that (1) in attempting to flee, Fraire drove recklessly and at a high speed into and around a residential neighborhood on a Sunday afternoon, and (2) attempted to run Lowery down.

Lowery's actions cannot be said to be grossly disproportionate to his self defense need under the circumstances. The eye-witness accounts confirm that Lowery was in mortal danger of being run over by Fraire's pickup, and that Lowery waited to fire until the last second when the truck was dangerously close. In fact, had the truck not veered to the left when Fraire was shot, Lowery might still have been severely injured or killed. We cannot say

that a reasonable police officer in Lowery's place would have understood his actions to be unlawful. All things considered, we find as did the district court that Lowery is entitled to qualified immunity.

B. The Claims Against the City

In Monell v. New York City Department of Social Services, [33] the Supreme Court held that municipalities may be liable for damages under Section 1983, but only when an official policy or governmental custom of the municipality causes the deprivation or violation of the constitutional rights complained of by the plaintiff. The municipal policy or custom must cause the employee to violate another's constitutional rights:

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[33] 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

> [I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government, as an entity, is responsible under Section 1983.[34]

Thus, Section 1983 liability attaches "only where the municipality itself cause the constitutional violation at issue."[35]

In their amended complaint, the Plaintiffs made certain allegations against the City of Arlington:

> 20. Plaintiffs would further allege that the rules, regulations and policies of Defendant City of Arlington, as well as the training program in existence prior to and at the time of the shooting of Javier Fraire did not emphasize that the use of lethal force against a person or citizen should be exercised only as a last resort when all other methods of apprehension have failed, in accordance with and pursuant to the requirements

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[34] Id. at 694, 98 S.Ct. at 2037.

[35] City of Canton v. Harris, 489 U.S. 378, 385, 109 S.Ct. 1197, 1203, 103 L.Ed.2d 412 (1989). (emphasis in original)

of the Fourth Amendment of the United States Constitution, made applicable to Defendants by the Fourteenth Amendment tot the United States Constitution. A result of the failure of Defendant City of Arlington to implement such policies, procedures and training programs designed to educate police officers in the utilization of deadly force only as a last resort, Decedent Javier Fraire was killed while other means of apprehension were readily available to Defendant Lowery and other employees of Defendant City of Arlington.

21. Plaintiffs would allege and prove that it was the custom and practice both before and after [the date of the shooting] for employees and officers of the City of Arlington to utilize deadly force in contravention of the standards and guidelines which comport with the Fourth and Fourteenth Amendments to the United States Constitution. In this regard, Plaintiffs would allege and prove that the investigation into the shooting of Javier Fraire by Defendant City of Arlington and the ultimate exoneration of Defendant James W. Lowery, Jr. in justifying his use of said force is direct evidence on the existence of such custom or practice. Specifically, Plaintiffs would allege that representatives of Defendant City of Arlington were aware that Defendant James W. Lowery, Jr. was not telling the truth in his explanation of how the shooting of Javier Fraire occurred in that his version of the incident

conflicted with every eyewitness to the occurrence.

The district court found that these allegations were insufficient to satisfy the standards for stating a cause of action against a municipality under Section 1983. We agree. We have consistently required a plaintiff to plead "specific facts, not merely conclusory allegations."[36] A Section 1983 plaintiff must plead specific facts with sufficient particularity to meet all the elements of recovery.[37] This heightened pleading requirement applies to allegations of municipal custom or

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[36] Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985).

[37] Id. at 1482.

policy.[38]

The Plaintiffs did not come close to the degree of particularity required to plead a Section 1983 claim adequately. The "blunderbuss phrasing of the arguable claims in the plaintiffs' complaints"[39] are wholly insufficient to state a Section 1983 claim. They state no facts to support their bald assertions that Arlington's policies, or its failure to implement policies, in any way violated Fraire's constitutional rights and contributed to his unfortunate death.

Moreover, even if we were to conclude that the Plaintiffs had met their burden

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[38] Rodriguez v. Avita, 871 F.2d 552 (5th Cir.1989) cert denied 493 U.S. 854, 110 S.Ct. 156, 107 L.Ed.2d 114 (1989); Palmer v. City of San Antonio, 810 F.2d 514 (5th Cir.1987).

[39] Elliott, 751 F.2d at 1476.

of pleading this Section 1983 claim with particularity, we could not find that they overcame their burden of producing specific facts showing a genuine issue of material fact for trial. Just as they did with respect to their complaints, the Plaintiffs have failed to come forward with specific facts sufficient to counter Arlington's contentions that its policies and customs were not constitutionally deficient. They merely argue that the city ratified Lowery's actions because it refused to discipline him, and because it allegedly knew that Lowery's version of the incident was untrue. Such allegations are wholly insufficient to satisfy the nonmovants' summary judgment burden.

Allegations of an isolated incident are not sufficient to show the existence of a

custom or policy.[40] "Isolated violations are not the persistent, often repeated constant violations that constitute custom and policy."[41] To demonstrate a municipal custom or policy under Section 1983, a plaintiff must at least allege:

> a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent policy misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the police force.[42]

This the Plaintiffs did not do.

The Plaintiffs allege, however, that an unconstitutional custom or policy can be

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[40] Rodriguez, 871 F.2d at 554; Palmer, 810 F.2d at 516.

[41] Bennett v. City of Slidell, 728 F.2d 762, 768 n.3 (5th Cir.1984), cert denied, 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985).

[42] Languirand v. Hayden, 717 F.2d 220, 227 (5th Cir.1983), cert denied, 467 U.S. 1215, 104 S.Ct. 2656, 81 L.E.2d 363 (1984).

inferred from the city's failure to discipline Lowery. We are not persuaded by this argument. In fact, we rejected a similar argument advanced in Berry v. McLemore.[43] There we found that a city's custom or policy authorizing or encouraging police misconduct "cannot be inferred from municipality's isolated decision not to discipline a single officer of a single incident of illegality".[44]

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[43] 670 F.2d 30 (5th Cir.1982) (overruled on other grounds, International Woodworkers of America v. Champion International Corporation, 790 F.2d 1174, 1181 (5th Cir.1986).

[44] Id at 33. Other circuits have taken the same position. See Santiago v. Fenton, 891 F.2d 373, 380-82 (1st Cir.1989); Batista v. Rodriguez, 702 F.2d 393, 397-8 (2nd Cir.1983); Harris v. City of Pagedale, 821 F.2d 499 (8th Cir.), cert. denied, 484 U.S.986, 108 S.Ct. 504, 98 L.Ed.2d 502 (1987); Davis v. City of Ellensburg, 869 F.2d 1230, 1233-35 (9th Cir. 1989); Depew v. City of St. Marys, 787 F.2d 1496, 1499 (11th Cir.1986).

Moreover, the Plaintiffs present nothing but conjecture when they allege that Arlington must have know Lowery was lying. They base this conjecture on the fact that the eye-witnesses placed Lowery away from his car toward the middle of the cul-de-sac at the time of the shooting, while Lowery said that he was using his car as a shield. Plaintiffs also contend that the initial conversation between Lowery and the occupants of the truck while it was in the driveway could not have taken place in the 24 seconds between Lowery's radio transmissions.

Under the circumstances of this fast moving and rapidly changing incident, we are not surprised that there are relatively minor discrepancies among the stories told by Lowery, Rodriguez and the bystanders on the cul-de-sac. We have learned to expect

that, given the tension and heat of the pursuit and the element of surprise in such a stressful situation, the versions of the facts related by the protagonists and the witnesses will almost always differ somewhat in the myriad details of the action. But in this case such differences are insufficient to place facts at issue. And they are especially lacking in significance when used in an effort to "prove" that the city knew Lowery was lying and that, therefore, the city must have intended to ratify Lowery's actions. The minor factual discrepancies are far too petty to constitute genuine issues of material fact.

Furthermore, the Plaintiffs made no attempt to counter the City's evidence of the polices actually in effect at the time of the shooting. They city's chief of

police [45] testified by affidavit in support of the City's motion to dismiss regarding the polices rules and regulations of his department. He averred that the conduct of Arlington police officers is primarily controlled by the police department's General Orders, first issued at least two years prior to the instant shooting. All Arlington officers are issued copies of the General Orders, are trained in their application, and are required to comply with them.

The police chief also averred that Arlington's police officers have never been

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[45] The chief of police is the principal policy maker for the Arlington Police Department. As such he promulgates all orders, rules and regulations for the department. He is also ultimately responsible for the supervision of the investigation of complaints made against police officers, and has the right to discipline or terminate any police officer for just and reasonable cause..

permitted to use unnecessary, unreasonable or excessive force in the performance of their duties. General Order 317.00, entitled "Use of Force", was in effect on the date of the shooting. It states that a police officer is afforded only a limited degree of discretion in determining the amount and degree of force used in particular cases. Those discretionary areas are described in General order 317.02, and include situations in which the police officer is acting in self-defense against unlawful violence to his person. Officers are admonished in General Order 317.03 that under no circumstances will the force used be greater than necessary. An Arlington police officer is responsible for exhausting every reasonable means of employing the minimum amount of force before escalating to a more severe

application of force.

Arlington police are authorized to use deadly force only under the specific circumstances listed in 317.05(b), which expressly authorizes officers to use deadly force only when doing so reasonably appears immediately necessary to protect themselves from substantial risk of death or serious bodily injury. Furthermore, General Order 317.05(c)(5) specifically prohibits officers from discharging their firearms in a misdemeanor case unless such discharge is necessary to defend life, including the officer's life. General Order 317.05(c)(6) prohibits officers from shooting at moving or fleeing vehicles, except when necessary to protect the officer's life and all other means of defense have failed.

To prevail in their claims against the City of Arlington, the Plaintiffs must show

that these policies are constitutionally deficient or that they authorize unconstitutional behavior. Further, the Plaintiffs must show that the deadly force policy caused Lowery to use excessive force against Fraire.

The bellwether case regarding a police officer's use of deadly force is Tennessee v. Garner.[46] In that case, a police officer shot and killed a burglary suspect when after being told to halt, the suspect fled over a fence at night in the backyard of the house he was suspected of burglarizing. The police officer never attempted to justify his actions on any basis other than the need to prevent an escape. The Supreme Court found that there was no reason to believe that the burglary

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[46] 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985).

suspect posed any danger to the police officer or to others. The Court held that the use of deadly force solely to prevent the escape of a felony suspect, whatever the circumstances, is constitutionally unreasonable:

> Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.... A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.[47]

The Court further declared, however, that when a police officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, the use of deadly force is not constitutionally unreasonable to prevent an escape.[48] Nothing in Garner

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[47] Id at 105 S.Ct. at 1701.

[48] Id.

prohibits an officer from using deadly force in self-defense when the officer has probable cause to believe that the suspect poses a threat of serious physical injury or death to the officer.

Arlington's deadly force policy in effect on the date of the incident is consistent with, and in fact is more restrictive than the standards required by Garner. Arlington's General Order 317.05(B) authorizes the use of deadly force only (1) when such force reasonably appears immediately necessary to protect the officer or others from substantial risk of death or serious bodily injury, (2) to prevent a crime or make an arrest when the suspect's actions place persons in jeopardy of serious bodily injury, (3) to apprehend an offender for a crime involving the use or attempted use of deadly force or when

there is a substantial risk that the person whose arrest is sought will cause death or serious bodily injury to others if apprehension is delayed, or (4) to prevent escape from custody when the officer or others are in imminent danger of death or serious bodily injury.

General Order 317.05(C) further restricts the use of deadly force in several specific situations. Arlington police officers are prohibited from discharging their firearms in any misdemeanor case, except in defense of life. Officers are also prohibited from firing their weapons at a moving or fleeing vehicle, again unless necessary to defend life and all other reasonable means of defense have failed.

Plaintiffs make much of the fact that three months after the Lowery incident,

Arlington amended its deadly force policy to prohibit an officer from intentionally or recklessly placing himself in front of an ongoing vehicle when the utilization of force is a likely outcome. The Plaintiffs assert that had this amended version of the policy been in effect at the time, Lowery would have been prohibited from making the maneuver he used when he shot Fraire, and that this amendment is direct evidence in support of the Plaintiffs' allegation that Arlington's policies, procedures and regulations were constitutionally defective at the time of the shooting. Such reasoning defies logic. As we just observed, Arlington's policies, procedures and regulations comported with and were even more restrictive than those required by Garner. The plaintiffs have pointed to no authority showing that the

new restriction is constitutionally mandated. Furthermore, just because Arlington amended its polices to make them more restrictive, it does not follow that the prior policies were constitutionally deficient. Moreover, the Plaintiffs engage in mere speculation, when they posit that if the new restriction had been in effect on the day Fraire was killed, the shooting would not have occurred; ergo the absence of the restriction caused the shooting. As we stated above, a direct causal connection must exist between the policy and the alleged constitutional deprivation. This connection must be more than a mere "but for" coupling between cause and effect.[49] To form the basis of liability under

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[49] See City of Canton, 109 S.Ct. at 1204-04; Oklahoma City v. Tuttle, 471 U.S. 808, 823, 105 S.Ct. 2427, 2436, 85 L.Ed.2d 791 (1985).

Section 1983, a municipal policy must be affirmatively linked to the constitutional violation and be the moving force behind it.[50]

The Plaintiffs have presented no summary judgment evidence that would place at issue any material facts with respect to the constitutionality of the Arlington deadly force policy. They have pointed to no provision in that policy that could be construed to authorize an office to use deadly force unnecessarily or unjustifiably. Neither is there any evidence that Arlington's deadly force policy in effect at the time of the shooting caused Lowery to use deadly force in violation of the Constitution. We find

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[50] Polk County v. Dodson, 454 U.S. 312,326 102 S.Ct. 445, 454, 70 L.Ed.2d 509 (1981).

that the Plaintiffs' claims against Arlington are unfounded.

IV

CONCLUSION

Officer Lowery acted in self defense when he fired a fatal shot at Fraire. Under the circumstances of this case, a reasonable police officer could have believed that in firing he was not violating Fraire's constitutional right to be free of excessive force. Consequently, Lowery is entitled to the defense of qualified immunity for his actions in defending his life.

In addition, the Plaintiffs failed to plead with sufficient particularity the facts and allegations necessary to present a claim against the City of Arlington under 42 U.S.C. Section 1983. Neither did the Plaintiffs proffer summary judgment

evidence that Arlington's deadly force policy condones the unjustifiable and unnecessary use of deadly force.

For the foregoing reasons, the district court's judgment dismissing the claims against Lowery and the City of Arlington is AFFIRMED.

APPENDIX B

Order Denying Motion for
Rehearing of May 7, 1992

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 91-1597

MARIA DEL ROSARIO C. FRAIRE, Individually and as Next Friend for MYRA FRAIRE and JUAN ANTONIO FRAIRE, Minor Children, and JOSEFA ESQUIVEL FRAIRE,

Plaintiffs-Appellants,

versus

CITY OF ARLINGTON and JAMES W. LOWERY, JR.,

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING

(May 7, 1992)

Before JONES, DUHE, and WEINER, Circuit Judges:

PER CURIAM:

IT IS ORDERED that the petition for

rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX C

District Court Opinion of May 16, 1991

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MARIA DEL ROSARIO FRAIRE, INDIVIDUALLY AND AS NEXT FRIEND FOR MYRA FRAIRE AND JUAN ANTONIO FRAIRE, MINOR CHILDREN, AND JOSEFA ESQUIVEL FRAIRE	)	
Plaintiffs	)	CIVIL ACTION NO. 4-89-826-A
v.	)	
CITY OF ARLINGTON AND JAMES W. LOWERY, JR.,	)	
Defendants	)	

MEMORANDUM OPINION
AND ORDER

Came on to be considered the motions to dismiss and for summary judgment of defendants, City of Arlington and James W. Lowery, Jr., respectively. The court has determined that the dismissals sought by City of Arlington's motions should be

granted, that plaintiffs' Section 1983[1] claims against Lowery should be dismissed, and that plaintiffs' state law claims against Lowery should be remanded to state court.

Plaintiffs are seeking in this removed action to recover damages alleged to have been caused by a fatal gunshot wound suffered by Javier Fraire ("Fraire") at the hands of defendant Lowery. Plaintiffs are Fraire's survivors. In general, plaintiffs allege that Lowery, a police officer of the City of Arlington, while out of uniform, without identifying himself as a police officer, and while operating an unmarked police automobile, gave chase to Fraire's pickup truck, which was occupied by Fraire and a passenger, because of suspicion that

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[1] 42 U.S.C. Section 1983.

Fraire was operating his vehicle while intoxicated, and that the chase terminated with the fatal shooting. The allegations of plaintiffs concerning the final phase of the chase and the fatal confrontation are, as contained in the amended petition, as follows:

> After the pickup returned to the street, Javier Fraire placed the pickup in drive and proceeded down Willowbrook until he made a left hand turn on Creekmeer Court. Plaintiffs would show that Creekmeer Court is a cul-de-sac, to-wit, a circular street with no exit other than return through its entrance. As the pickup driven by Javier Fraire negotiated the circle, the unmarked vehicle driven by James W. Lowery, Jr. continued to follow it in hot pursuit. As Fraire proceeded to turn in the cul-de-sac, Defendant James W. Lowery, Jr., parked his automobile, exited his vehicle, pulled his .9mm semi-automatic weapon, and walked or ran to a position in the cul-de-sac blocking the exit of the pickup driven by Javier Fraire. As Fraire's vehicle proceeded to leave the cul-de-sac, Lowery fired one shot hitting Fraire in the head. As a result of the wound inflicted by Defendant James W. Lowery, Jr., Javier Fraire subsequently died later on November 22, 1987.

16. At no time during the chronology above described did Defendant James W. Lowery, Jr. exhibit or show a badge identifying him as an officer of the Arlington Police Department. As a result, during the entire chronology above described, at no time did the occupants of the vehicle driven by Javier Fraire know that the Defendant James W. Lowery, Jr. was a police officer.

17. Plaintiffs would allege and prove that Lowery's maneuver in intentionally placing himself in front of the vehicle driven by Javier Fraire in an effort to apprehend the occupants of the vehicle for the suspected crime of driving while intoxicated and subsequently utilizing deadly force in killing Javier Fraire, constituted an unlawful seizure in violation of those rights granted to Javier Fraire by the Fourth and Fourteenth Amendments of the United States Constitution.

First Amended Complaint, pages 7-9.

Lowery's motion for summary judgment presents the issue of whether plaintiffs have failed to plead a cognizable claim against him under 28 U.S.C. Section 1983 and the Fourth Amendment to the

Constitution of the United States, whether plaintiffs have failed to plead sufficient facts to overcome Lowery's qualified immunity defense, and whether plaintiffs' claims against Lowery are barred, in whole or in part, by the qualified-immunity defense as a matter of law. Defendant James Lowery's Motion to Dismiss or, in the Alternative, for Summary Judgment and Brief in Support, pages 10-11.

The summary judgment record includes affidavits of Lowery and Fraire's passenger and copies of affidavits or statements of numerous witnesses to the event, among which is an investigative question and answer statement of Fraire's passenger. No party has challenged any of the proffered evidence as being inappropriate to be considered for summary judgment purposes. Once Lowery put in issue by motion for

summary judgment the existence of a viable Section 1983 cause of action, plaintiffs had the burden, in order to avoid summary judgment, to come forward with summary judgment evidence showing factual basis for each of the essential elements of a Section 1983 case. Cf. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

When a fact-specific inquiry is made into the objective question of whether a reasonable officer could have believed Lowery's conduct lawful, in the light of clearly established law and the information he possessed, an affirmative answer is inevitable. Cf. Anderson v. Creighton, 483 U.S. 635, 641 (1987). Plaintiffs admit by the allegations of their complaint that Lowery suspected Fraire of the crime of driving while intoxicated, and plaintiffs have pleaded that Lowery intentionally

placed himself in front of Fraire's vehicle in an effort to apprehend Fraire for that crime. There is summary judgment evidence that Lowery was in danger of physical harm from Fraire's operation of the pickup truck, and that Lowery fired at Fraire in response to the threat of harm to himself. There is no genuine dispute that Fraire knew Lowery was a law enforcement officer for a period of time before he made his fatal decision to drive his pickup toward Lowery.[2] Any two officers might have responded differently to the situation with which Lowery was faced, but the question is not whether another officer, or even

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[2] Appendix in Support of Plaintiffs' Response to Defendants' Motions to Dismiss, or in the Alternative, for Summary Judgment and Brief in Support, Investigative Interview of Jose Luis Rodriguez, pages 7-8. Also see paragraphs 20 and 21 of admitted facts on pages 15 and 16 of Pretrial Order.

another reasonable officer, would have responded in a different manner. Rather, the issue is whether Lowery took actions "that a reasonable officer could have believed lawful" -- if he did, he is entitled to dismissal. Id. at 646 n. 6. There might have been more than one course of action from which an officer reasonably could have chosen under the circumstances.

There is no summary judgment evidence that would support a conclusion that no reasonable officer, taking relevant factors into account, would have had the belief that his conduct was lawful when responding as Lowery did. On the other hand, there is summary judgment evidence that leads to a conclusion that the actions Lowery took were actions that a reasonable officer could have believed lawful. Lowery's efforts to prevent an intoxicated driver

from continuing his journey to the risk of other members of the traveling public could be viewed by a reasonable officer to be appropriate. When in the course of those actions Lowery's physical safety became imperiled, his response by gunfire could be thought by a reasonable officer to be an appropriate and reasonable one. Obviously, no reasonable officer would intentionally kill an intoxicated driver just to put an end to his drunken journey. This case is not so simple. It must be viewed from the standpoint of reasonableness of Lowery's conduct at more than one point in time. When thus viewed, the conclusions become apparent that at each step of the way Lowery took action that a reasonable officer could have believed lawful. In hindsight, perhaps he made a mistake or a grievous error, but that is not the test

that determines whether he has Section 1983 liability. See Graham v. Connor, 490 U.S. 386, 396 (1989). The court, therefore, is ordering dismissal of plaintiffs' Section 1983 action against Lowery individually.

Plaintiffs say that they are suing Lowery in his official capacity as well as individually. To whatever extent plaintiffs' complaint might be considered to be an action against Lowery under Section 1983 in his official capacity, it is dismissed, both in response to Lowery's motion to dismiss and Rule 56 motion. In Brandon v. Holt, 469 U.S. 464 (1985), the Supreme Court made clear that an action brought under Section 1983 against a police official in his official capacity is tantamount to an action against the public entity for which the official is alleged to act. Id. at 472. Individual liability of

the official cannot flow from a suit against him in his official capacity. A judgment against him in that capacity is the same as a judgment against the public entity he represents, assuming that the public entity has received notice and an opportunity to respond. Id. at 471-72. There is no reason for this action to be maintained against Lowery in his official capacity and at the same time against City of Arlington. All Section 1983 claims against Lowery, in any capacity, are being dismissed.

Because of the decision of the court to grant dismissal of all claims asserted by plaintiffs against the other defendant, City of Arlington, the court does not have subject matter jurisdiction over the remaining causes of action. Therefore, the court has determined that plaintiffs'

pendent state law claims against Lowery should be remanded to the state court from which this action was removed. See Mine Workers v. Gibbs, 383 U.S. 715, 725-27 (1966); Carnegie-Mellon Univ. v. Cohill, 489 U.S. 343, 351-52 (1988).

Turning now to plaintiffs' allegations against City of Arlington. In pertinent part, plaintiffs' allegations against City of Arlington are that:

> 20. Plaintiffs would further allege that the rules, regulations and policies of Defendant City of Arlington, as well as the training program in existence prior to and at the time of the shooting of Javier Fraire did not emphasize that the use of lethal force against a person or citizen should be exercised only as a last resort when all other methods of apprehension have failed, in accordance with and pursuant to the requirements of the Fourth Amendment of the United States Constitution, made applicable to Defendants by the Fourteenth Amendment to the United States Constitution. As a result of the failure of Defendant City of Arlington to implement such policies, procedures and training programs designed to educate police

officers in the utilization of deadly force only as a last resort, Decedent Javier Fraire was killed while other means of apprehension were readily available to Defendant Lowery and other employees of Defendant City of Arlington.

21. Plaintiffs would allege and prove that it was the custom and practice both before and after November 22, 1987, for employees and officers of the City of Arlington to utilize deadly force in contravention of the standards and guidelines which comport with the Fourth and Fourteenth Amendments to the United States Constitution. In this regard, Plaintiffs would allege and prove that the investigation into the shooting of Javier Fraire by Defendant City of Arlington and the ultimate exoneration of Defendant James W. Lowery, Jr. in justifying his use of said force is direct evidence on the existence of such custom or practice. Specifically, Plaintiffs would allege that representatives of Defendant City of Arlington were aware that Defendant James W. Lowery, Jr. was not telling the truth in his explanation of how the shooting of Javier Fraire occurred in that his version of the incident conflicted with every eyewitness to the occurrence.

Amended Complaint, pages 9-11.

These allegations are not sufficient to satisfy the standards for statement of a cause of action against a municipality under Section 1983. The Fifth Circuit repeatedly has held that district courts should hold plaintiffs in Section 1983 actions such as this to a high degree of particularity in their pleadings. See Rodriguez v. Avita, 871 F.2d 552, 554 (5th Cir. 1989); Palmer v. City of San Antonio, Texas, 810 F.2d 514, 516 (5th Cir. 1987); Elliott v. Perez, 751 F.2d 1472, 1479 (5th Cir. 1985); and, Morrison v. City of Baton Rouge, 761 F.2d 242, 244-45 (5th Cir. 1985). Elliott explained the policy reasons why "blunderbuss phrasing of the arguable claims in the plaintiffs' complaints" will not suffice, and noted that a lack of pleading particularity "eviscerates important functions and

protections of official immunity." Elliott, 751 F.2d at 1476. In Elliott, the Fifth Circuit stated that "[i]n the now familiar cases involving 42 U.S.C. Section 1983 we consistently require the claimant to state specific facts, not merely conclusory allegations." Id. at 1479,

While Elliott dealt with an action against public officials, its principles apply with equal force to an action against a public entity. Palmer was such an action. Apropos to the instant case, the Fifth Circuit said in Palmer:

> Similarly, an isolated incident is not sufficient to show that a custom exists. As we stated in Bennett v. City of Slidell, 728 F.2d 762, 768 n.3 (5th Cir. 1984) (en banc), cert. denied, 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985): "Isolated violations are not the persistent, often repeated, constant violations that constitute custom and policy."
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> * * *
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> We have also consistently required

> a section 1983 plaintiff to state specific facts and not merely conclusory allegations. Elliott v. Perez, 751 F.2d 1472, 1479 & n. 20 (5th Cir. 1985) (citing cases). While it might be possible that a basis for municipal liability exists in this case, Palmer states no facts in his complaint to support his assertion that San Antonio authorized and approved the practice of its police officers using excessive force when making arrests or that such a well settled practice of doing so existed. Although Palmer has already amended his complaint once, the compliant still fails to meet the requirements of Elliott. As we have made clear, the assertion of a single incident is not sufficient to show that a policy or custom exists on the part of a municipality. Slidell, 728 F.2d n. 3. Palmer failed to allege that there are prior incidents which if taken as true, would reveal the existence of an unconstitutional custom on the part of San Antonio. Accordingly, we affirm the district court's order of dismissal with respect to the city of San Antonio.

Id. at 516-17.

Rodriguez made clear that boilerplate, conclusionary allegations combined with a description of a single incident will not suffice. When speaking in reference to a

pleading that was no more generally worded than the one involved in this action, the court stated:

> Such a pleading does no more than describe a single incident of arguably excessive force applied by one officer--a description decked out with general claims of inadequate training and gross negligence, all concededly stemming from the single incident and nowhere else. It is clear from counsel's quoted colloquy with the trial judge that he has pled his case fully and has nothing to add, that the sole foundation for his general and conclusory allegations of "gross negligence" and "grossly inadequate training" was the pleaded incident itself. Under the rules of Tuttle and Languirand discussed above, there is no case--not as a matter of pleading, merely, but as one of conceded fact.

Id. at 555.

Plaintiffs have been given an opportunity since the filing of the motions to dismiss and for summary judgment to amend their complaint, and have availed themselves of that opportunity. Still, their theories of municipal entity

liability against City of Arlington are blunderbuss in character and describe only an isolated incident "decked out in general claims of inadequate training..." and custom and practice. Id. at 555.

Even is the court were to overlook the inadequacies in plaintiffs' allegations against City of Arlington, plaintiff nevertheless would be unable to clear the hurdle created by City of Arlington's Rule 56 motion. In McKee v. City of Rockwall, Texas, 877 F.2d 409 (5th Cir. 1989), the Fifth Circuit considered an action against a public entity under Section 1983 in a summary judgment context. The claim of McKee was based on an alleged policy of the Rockwall police department discouraging arrests in domestic violence cases, which McKee contended discriminated against women. In the course of discussing McKee's

summary judgment burden on the issue of whether the police department had a discriminatory policy, the court explained:

> McKee must present some evidence of such a policy in order to survive the defendants' summary judgment motion. When the nonmovant fails to make a sufficient showing on an essential element of her case, the moving party is entitled to summary judgment "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."

Id. at 414-15 (quoting ... Celotex Corp.v. Catrett, 477 U.S. 317, 323 (1986)).

Although the court was applying City of Canton[3] to a claim of individual liability rather than to a claim public entity liability, the Third Circuit in Sample v. Diecks, 885 F.2d 1099 (3rd Cir. 1989), provided a helpful discussion of the degree of proof that must be brought to bear by a

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[3] City of Canton v. Harris, 489 U.S. 378 (1989).

plaintiff in order to avoid a summary disposition. The court said:

> Based on City of Canton, we conclude that a judgment could not properly be entered against Robinson in this case based on supervisory liability absent an identification by Sample of a specific supervisory practice or procedure that Robinson failed to employ and specific findings by the district court that (1) the existing custom and practice without that specific practice or procedure created an unreasonable risk of prison overstays, (2) Robinson was aware that this unreasonable risk existed, (3) Robinson was indifferent to that risk, and (4) Diecks' failure to assure that Sample's complaint received meaningful consideration resulted from Robinson's failure to employ that supervisory practice or procedure.....
>
> On remand, the district court should bear in mind that under the teachings of City of Canton it is not enough for a plaintiff to argue that the constitutionally cognizable injury would not have occurred if the superior had done more than he or she did. The district court must insist that Sample identify specifically what it is that Robinson failed to do that evidences his deliberate indifference. Only in the context of a specific defalcation on the part of the supervisory official can the court assess whether the officials's conduct evidenced

deliberate indifference and whether there is a close causal relationship between the "identified deficiency" and the "ultimate injury."

Id. at 1118.

In Oklahoma City v. Tuttle, 471 U.S. 808, 823-24 (1985), the Supreme Court emphasized the burden of proof in a case where liability is sought to be imposed under Monell[4], saying:

> Here the instructions allowed the jury to infer a thoroughly nebulous "policy" of "inadequate training" on the part of the municipal corporation from the single incident described earlier in this opinion, and at the same time sanctioned the inference that the "policy" was the cause of the incident. Such an approach provides a means for circumventing Monell's limitations altogether. Proof of a single incident of unconstitutional activity is not sufficient to impose liability under Monell, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker. Otherwise the existence of the

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[4] Monell v. New York City Department of Social Services, 436 U.S. 658 (1978).

> unconstitutional policy, and its origin, must be separately proved. But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation. Under the charge upheld by the Court of Appeals the jury could properly have imposed liability on the city based solely upon proof that it employed a nonpolicymaking officer who violated the Constitution. The decision of the Court of Appeals is accordingly reversed.

Id. at 823-24.

And, the heavy burden of proof to be borne by plaintiff in a case such as this was again recognized in Pembaur v. Cincinnati, 475 U.S. 469 (1986), where the court stated:

> We hold that municipal liability under Section 1983 attaches where--and only where--a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. See Tuttle, supra, at 823, 85 L Ed 2d 791,

> 1095 S Ct 2427 (" 'policy' generally implies a course of action consciously chosen from among various alternatives").

Id. at 483-84.

Plaintiffs' pendent state law claim against City of Arlington are equally unmeritorious. Police functions of a municipality are governmental functions for which the municipality, a general proposition, has immunity from liability. City of Dallas v. Moreau, 718 S.W.2d 776, 779 (Tex.App. - Corpus Christi 1986, writ ref'd n.r.e.); Cronen v. Nix. 611 S.W. 2d 651, 653 (Tex.Civ.App. - Houston [1st Dist.] 1980, writ ref'd n.r.e.). The Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code Section 101.021, provides exceptions to the immunity of liability, but none apply here.

One of the exceptions causes a governmental unit to be liable for death proximately caused by the wrongful act or omission or the negligence of an employee acting within the scope of his employment if the "death arises from the operation or use of a motor-driven vehicle...." Id. at Section 101.021. Plaintiffs place reliance on this section, alleging that Lowery:

> . . . was negligent in his utilization of a motor driven vehicle, to-wit, an unmarked police car, as he negligently pursued the vehicle driven by Defendant Javier Fraire at the time and on the occasion in question. But not for such pursuit, Defendant Lowery would not have utilized deadly force to shoot Javier Fraire.

First Amended Complaint, page 13. There are no allegations that Lowery operated the police vehicle negligently, nor have plaintiffs offered any summary judgment evidence to that effect. The theory of negligent "utilization" is unprecedented

and unsound. Even if there were an allegation of negligence on the part of Lowery in the operation of his vehicle, as a matter of law such negligence did not cause the death of Fraire. Certainly plaintiffs cannot adduce evidence that would satisfy the foreseeability element of proximate cause.

Another exception to the immunity from liability growing out of governmental functions has to do with death proximately caused by "use of tangible property." Tex. Civ. Prac. & Rem. Code, Section 101.021. Conceivably plaintiffs are contending that Lowery's failure to exhibit his badge constituted use of tangible property. However, Texas courts have held that the Texas Tort Claims Act does not cause a waiver of governmental immunity in all cases where some item of personal property

is either used, misused or not used and that the injury to a plaintiff must be proximately caused either by the negligence of an employee acting in the scope of his employment in that employee's use or misuse of tangible property or under circumstances where an employee or agent furnished tangible property, the use or misuse of which caused the personal injury. Lowe v. Texas Tech University, 540 S.W.2d 297 (Tex. 1976). Hein v. Harris County, 557 S.W.2d 366 (Tex.Civ.App. - Houston [1st Dist] 1977, writ ref'd n.r.e.); and Williams v. State, 716 S.W.2d 96 (Tex. App. - Waco 1986, writ ref'd n.r.e.). As a matter of law, the failure of Lowery to exhibit his badge did not cause the death of Fraire. Indeed, as previously noted, the summary judgment record establishes that Fraire knew Lowery was a police officer somewhat

in advance of the final fatal encounter. Thus, the failure of Lowery to identify himself as a police officer has no relevance to this case.

For the reasons given in this opinion,

The court ORDERS (a) that all claims and causes of action asserted by plaintiffs against defendant Lowery under Section 1983 or the Constitution of the United States, be, and they are hereby, dismissed, (b) that all claims and causes of action asserted by plaintiffs against defendant City of Arlington on any basis or under any theory are hereby dismissed, and City of Arlington is discharged and relieved of any liability to plaintiffs, and (c) that all claims of plaintiffs against Lowery that have not been dismissed are remanded to the state court from which this action was removed.

SIGNED May _____ , 1991.

_____

JOHN McBRYDE
United States District Judge

APPENDIX D

Final Judgment of District Court
of May 16, 1991

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MARIA DEL ROSARIO FRAIRE, INDIVIDUALLY AND AS NEXT FRIEND FOR MYRA FRAIRE AND JUAN ANTONIO FRAIRE, MINOR CHILDREN, AND JOSEFA ESQUIVEL FRAIRE	)	
Plaintiffs	)	CIVIL ACTION NO. 4-89-826-A
v.	)	
CITY OF ARLINGTON AND JAMES W. LOWERY, JR.,	)	
Defendants	)	

FINAL JUDGMENT

For the reasons given in the memorandum opinion and order signed by the court on this date,

THE COURT ORDERS, ADJUDGES and DECREES that all claims and causes of action

asserted by plaintiffs, Maria del Rosario C. Fraire, Myra Fraire, Juan Antonio Fraire, and Josefa Esquivel Fraire (who) are referred to in plaintiffs' pleading as "Maria del Rosario C. Fraire, individually and as next friend for Myra Fraire and Juan Antonio Fraire, minor children, and Josefa Esquivel Fraire") against defendant James W. Lowery, Jr., based upon or under 42 U.S.C. Section 1983 or the Constitution of the United States be, and they are hereby, dismissed;

The court further ORDERS, ADJUDGES and DECREES that all claims and causes of action asserted by plaintiffs against defendant City of Arlington, Texas, on any basis or under any theory are hereby dismissed;

The court further ORDERS, ADJUDGES and DECREES that all claims and causes of

action asserted by plaintiffs against defendant James W. Lowery, Jr., that are not being dismissed by this order, be, and are hereby, remanded to the state court from which this action was removed; and

The court further ORDERS that defendant City of Arlington, Texas, have and recover costs of court from plaintiffs and that all other costs of court incurred by the parties to this action shall abide the outcome of the remanded claims, to be taxed pursuant to future proceedings in the state court.

SIGNED May _____ , 1991.

_____

JOHN McBRYDE
United States District Judge

Supreme Court, U.S.
FILED
SEP 21 1992
OFFICE OF THE CLERK

No. 92-393

In The

Supreme Court of the United States

October Term, 1992

MARIA DEL ROSARIO C. FRAIRE, Individually and as Next Friend for MYRA FRAIRE and JUAN ANTONIO FRAIRE, Minor Children, and JOSEFA ESQUIVEL FRAIRE,

Petitioners,

v.

CITY OF ARLINGTON AND JAMES W. LOWERY, JR.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT CITY OF ARLINGTON'S BRIEF IN OPPOSITION

GREGORY S. NORRIS
Assistant City Attorney
Counsel of Record for
Respondent City of Arlington

Arlington City Attorney's Office
Post Office Box 231
Arlington, Texas 76004-0231
(817) 459-6878
FAX (817) 459-6897

LEXA LAW BRIEF PRINTING CO., INC. (713) 224-0464
TOLL FREE (800) 242-2811

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether, under 42 U.S.C. § 1983, a municipal policy or custom authorizing or condoning the use of excessive force by police officers in violation of the Fourth Amendment can be inferred from a single failure of a municipality to discipline a single police officer for a single alleged use of excessive force.

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No. 92-393

In The

Supreme Court of the United States

October Term, 1992

MARIA DEL ROSARIO C. FRAIRE, Individually and as Next Friend for MYRA FRAIRE and JUAN ANTONIO FRAIRE, Minor Children, and JOSEFA ESQUIVEL FRAIRE,

Petitioners,

v.

CITY OF ARLINGTON AND JAMES W. LOWERY, JR.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT CITY OF ARLINGTON'S BRIEF IN OPPOSITION

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Respondent City of Arlington, Texas ("Arlington") respectfully requests that this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 957 F.2d 1268.

I. STATEMENT OF THE CASE

A. On November 22, 1987, in Arlington, Texas, Respondent James W. Lowery, Jr. ("Lowery") shot Javier Fraire ("Fraire") in self-defense as Frai.e attempted to drive over Lowery with his pickup truck.

B. Arlington does not in any way adopt or endorse Petitioners' version of the incident on November 22, 1987, which contains inaccuracies and baseless conclusions and allegations. The Fifth Circuit had before it the fully-developed summary judgment record and has objectively recited the facts in its opinion. For the sake of brevity and to avoid repetition, Arlington adopts and incorporates by reference the operable facts in the Fifth Circuit opinion. *Fraire*, 957 F.2d at 1270-1272.

C. Contrary to Petitioners' version, not every eyewitness contradicted Lowery's version of the story. Sworn statements of at least three eyewitnesses confirm Lowery's statement that he verbally identified himself as a police officer to Fraire, that Fraire then suddenly and rapidly accelerated his pickup truck directly at Lowery and that Lowery fired his firearm at the fast approaching pickup truck only at the last moment. *See Id.* at 1271-1272, 1274.

D. Also contrary to Petitioners' version, the Arlington Police Department's internal affairs investigation does not repudiate Lowery's version of the incident of November 22, 1987. The report concluded that Lowery fired his weapon in self-defense consistent with the police department's written deadly force policy and Texas law. Beyond Petitioners' mere conjecture, there is no evidence that Lowery lied or concocted his version of the incident of November 22, 1987. There is no evidence that Arlington knew of any alleged lying by Lowery. *Id.* at 1279.

E. On November 17, 1989, Petitioners initiated their cause of action against Arlington and Lowery under 42 U.S.C. § 1983. After sixteen months of discovery, Petitioners were granted leave to file an amended complaint. In their amended complaint, Petitioners allege only a single, isolated use of excessive force by Lowery. Further, they allege only a single, isolated failure by Arlington to discipline Lowery for the alleged use of excessive force. They also allege that Arlington had constitutionally deficient policies and procedures regulating the use of deadly force by its police officers.

F. Arlington filed its motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure or, in the alternative, for summary judgment under Rule 56. Among the summary judgment evidence produced by Arlington is the affidavit of David M. Kunkle, Arlington Chief of Police. ("Chief Kunkle") Chief Kunkle's testimony is unchallenged and uncontroverted by Petitioners.

G. Chief Kunkle testifies that he is responsible for the immediate direction and control of the Arlington Police Department and issues the department's written General Orders which are policies and procedures that primarily control the conduct of Arlington police officers. He is ultimately responsible in Arlington for enforcing the General Orders, for the investigation of police misconduct and the use of deadly force by Arlington officers, and for the disciplining of officers for violations of the General Orders and state and federal law.

H. Chief Kunkle testifies in his affidavit that the use of excessive force by Arlington police officers is prohibited by the written deadly force policy in the Arlington Police Department's General Orders. *See Id.* at 1279-1280. Chief Kunkle further testifies that

the department's General Orders have written procedures whereby complaints of the illegal use of excessive force or of deadly force are investigated by the department. In fact, all uses of deadly force by Arlington officers are required to be investigated by the General Orders. During Chief Kunkle's tenure, all uses of deadly force and all complaints of police misconduct, including complaints of excessive use of force, have been investigated pursuant to the General Orders. Chief Kunkle further testifies that, when violations of the General Orders and complaints of misconduct, including the illegal use of excessive force, are sustained by the investigation, the police officer is disciplined and may be reassigned or given additional training depending upon the circumstances.

I. There is no allegation and no evidence in the record that, prior or subsequent to November 22, 1987, there has been a series or pattern of excessive use of force committed by Lowery or by other Arlington police officers. There is no allegation and no evidence that, prior or subsequent to November 22, 1987, police misconduct and misbehavior were widespread throughout the Arlington Police Department. There is no allegation and no evidence that Chief Kunkle has consistently failed to investigate or to discipline Arlington police officers for excessive use of force or other misconduct committed in the performance of their duties. There is no allegation and no evidence that the disciplinary procedures utilized by the Arlington Police Department are so inadequate that a police officer who engages in misconduct can be assured of going unpunished by Chief Kunkle.

J. The district court ruled that the Section 1983 action against Arlington should be dismissed, not only because the amended complaint failed to allege a cause of action, but also because Petitioners failed to

meet their summary judgment burden under Rule 56 of the Federal Rules of Civil Procedure to produce specific facts showing a genuine issue of material fact for trial in response to Arlington's motion. *See Id.* 1272, 1278.

K. On appeal before the Fifth Circuit, Petitioners raised only two issues: (1) whether a municipal custom or policy authorizing the use of excessive force can be inferred from Arlington's single failure to discipline Lowery for a single alleged use of excessive force; and (2) whether Arlington's written deadly force policy in the police department's General Orders in effect on November 22, 1987 was constitutionally deficient.

L. As the district court, the Fifth Circuit ruled that, not only did Petitioners' amended complaint fail to state a cause of action under 42 U.S.C. § 1983 but that Petitioners did not overcome their burden under Rule 56 of producing specific facts showing a genuine issue of material fact for trial. Petitioners had failed to show any more than a single, isolated incident of illegality. *Id.* 1278-79.

M. With respect to the second issue raised, the Fifth Circuit specifically found that Arlington's written deadly force policy in the police department's General Orders was consistent with and, in fact, was more restrictive than the Fourth Amendment requirements expressed by this Court in *Tennessee v. Garner*, 471 U.S. 1 (1985). *Id.* at 1280. Petitioners do not challenge this portion of the Fifth Circuit's opinion or the constitutionality of Arlington's deadly force policy in any respect in their Petition before this Court.

II. REASONS FOR DENYING THE WRIT

A. The Fifth Circuit's opinion is consistent with the prior decisions of this Court.

In their Petition, Petitioners challenge the Fifth Circuit's holding that their proof of a single decision not to discipline Lowery for a single use of alleged excessive force is insufficient to establish a municipal custom or policy condoning or authorizing the illegal use of excessive force.

In *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), this Court held that municipalities may be liable for damages under 42 U.S.C. § 1983, but only where an official policy or governmental custom of the municipality caused the deprivation or violation of the constitutional rights complained of by the plaintiff. The Court expressly rejected governmental *respondeat superior* as a basis for liability under Section 1983. A municipality cannot be held liable solely because it employs a tortfeasor. *Id.* at 691. The municipal policy or custom must cause the employee to violate another's constitutional rights:

> [I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983.

Id. at 694. Thus, Section 1983 liability attaches "only where the municipality *itself* causes the constitutional violation at issue." *City of Canton v. Harris*, 489 U.S. 378, 385 (1989) (emphasis in original).

The only question of municipal liability under Section 1983 presented by Petitioner in their Petition is whether the allegation and proof of a single failure of a municipality to discipline a single police officer for a single act of alleged excessive force is sufficient to establish a municipal custom or policy authorizing excessive force in violation of the Fourth Amendment. This Court has already answered that question in *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

Tuttle was this Court's first effort to expand upon the custom or policy requirement of *Monell*. The trial court in *Tuttle* had instructed the jury that a single unusually excessive use of force may be sufficient to warrant an inference of custom or policy such as to render the municipality liable under Section 1983. The plurality opinion in *Tuttle* disapproved of the inference:

> Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policy-maker . . . [W]here the policy relied upon is not itself unconstitutional, considerable more proof than a single incident must be necessary in every case to establish both the requisite fault on the part of the municipality and the causal connection between the "policy" and the constitutional deprivation.

Id. at 824. (plurality opinion by Rehnquist, J.)

Even the concurring opinion agreed that a single isolated incident of police misconduct is insufficient to establish a municipal policy or custom:

> . . . To infer the existence of a city policy from the isolated misconduct of a single, low-level officer, and then to hold the city liable on the basis of that policy, would amount to permitting precisely the theory of strict *respondeat superior* rejected in *Monell*. . . .
>
> . . . [T]he scope of § 1983 liability does not permit such liability to be imposed merely on evidence of the wrongful actions of a single city employee not authorized to make city policy. . . .

Id. at 831, 833 (concurring opinion by Brennan, J.)

The Fifth Circuit's opinion is consistent with the Court's plurality and concurring opinions in *Tuttle*. *Fraire*, 957 at 1278-1279. In their Petition, Petitioners have failed to distinguish their case from *Tuttle*. They do not challenge the constitutionality of the Arlington Police Department's written deadly force policy. They do not submit proof of any more than a single isolated decision not to discipline a single officer for a single act of alleged misconduct.

Petitioners instead rely upon this Court's decision in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). To support their reliance, they quote out-of-context a couple of phrases from the Court's opinion. In *Pembaur*, county deputy sheriffs attempted to serve capiases on two employees at a physician's clinic. The physician refused to allow the deputies to enter the clinic to search for the employees. After being informed of this situation by the

deputies, the county prosecutor instructed the deputy sheriffs to "go in and get the witnesses." Acting on these instructions, the deputy sheriffs forcibly entered and searched the clinic for the two witnesses. *Id.* at 473.

The issue on appeal was whether or not the county had an official policy which caused the constitutional violation. The Court was particularly concerned with the court of appeals holding that a single decision by a municipal policymaker to take a particular action cannot establish the kind of official policy required by *Monell.* The Court reversed and held that a municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances:

> If the decision to adopt that particular course of action is appropriately made by that government's authorized decisionmakers, it surely represents an act of official "government policy" as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly.

Pembaur, at 481.

The Court found that the county prosecutor was a final decisionmaker or policymaker for the county. Therefore, the county was liable under Section 1983 because the prosecutor's instructions to the deputy sheriffs constituted county policy and because those instructions (the policy) caused the constitutional violation. In effect, the actions of the prosecutor directly caused the constitutional violation.

The facts of the case before the Court are very different. Fraire was shot by Lowery, who is a police officer in the Arlington Police Department. Appellants neither allege nor produce any evidence that Lowery is a final decisionmaker or policymaker for Arlington. Based upon the summary judgment evidence in the record, the final decisionmaker or policymaker for Arlington on police matters is Chief Kunkle. Chief Kunkle did not order or direct Lowery to stop or to shoot Fraire. He did not participate in any way in this incident or the events that led to the shooting. He did not supervise or direct Lowery's conduct at any time. The acts and conduct which caused the shooting and death of Fraire were not the acts and conduct of Chief Kunkle. Chief Kunkle did nothing to cause the shooting of Fraire by Lowery. Because Lowery is not an official in Arlington with final decisionmaking or policymaking authority, his conduct and acts during the single incident on November 22, 1987 cannot be attributed to Arlington under Section 1983. To do otherwise in this case would be to hold Arlington liable under the doctrine of *respondeat superior*. *Pembaur*, therefore, is inapplicable to Petitioners' case.

Furthermore, there is no allegation and no evidence produced by Petitioners that Arlington's failure to discipline Lowery caused Lowery to use excessive force. This Court has expressed the causation element in Section 1983 cases in different ways. *Polk County v. Dodson*, 454 U.S. 312, 326 (1981) (the municipal policy must be "the moving force of the constitutional violation"); *Tuttle*, 470 U.S. at 823, ("there must be an affirmative link between the policy and the particular constitutional violation alleged"); and *City of Canton*, 489 U.S. at 385 (there must

be a "direct causal link" between the municipal policy or custom and the alleged constitutional deprivation). The common elements to these expressions are nexus and causation, neither of which is alleged or shown by Petitioners.

Petitioners fail to show or to explain how the single failure to discipline Lowery and the subsequent investigation of the incident by the Arlington Police Department caused Lowery to shoot Fraire on November 22, 1987. Upon what basis could Lowery have believed that he was free to engage in misconduct by using excessive force on November 22, 1987, that the police department would conduct an investigation finding that he had not engaged in misconduct, and that Chief Kunkle would not discipline him for the misconduct? Given the uncontroverted testimony of Chief Kunkle regarding Arlington's policy of disciplining police officers for misconduct, including the use of excessive force, how was Lowery to know that, if he engaged in such misconduct, he alone for some reason would go unpunished?

Petitioners do not allege or show that Lowery has ever engaged in any prior or subsequent act constituting misconduct, including the use of excessive force or illegal use of deadly force. They do not allege or show that Lowery has engaged in any prior or subsequent acts of misconduct or misbehavior for which he was not disciplined by Arlington. They do not allege or show any prior acts of misconduct by any other Arlington officers where the officers were not punished. There was no reason for Lowery to believe that he would not be disciplined for misconduct. There is no evidence that Chief Kunkle's decision not to discipline caused Lowery to

engage in the misconduct, if any, alleged by Petitioners. Indeed, the clear cause of Lowery's use of deadly force was Fraire's attempt to run over him with his pick-up truck.

B. There is No Conflict Among the Courts of Appeals.

As Petitioners concede, federal circuits throughout the country uniformly require more than a single failure to discipline a single police officer to establish a municipal custom or policy under Section 1983. These courts have found that the municipality's failure to discipline a single police officer or to take other corrective steps in response to a single incident is insufficient to constitute a policy of acquiescence, encouragement, or ratification of unconstitutional conduct. Only where there is a pattern of repeated constitutionally offensive conduct by police officers of which the policymaker has or should have knowledge and where the policymaker has persistently failed to take remedial or corrective steps can a municipal policy of acquiescence, encouragement, or ratification of unconstitutional police conduct be inferred. *Carter v. District of Columbia*, 795 F.2d 116 (D.C. Cir. 1986); *Santiago v. Fenton*, 891 F.2d 373, 380-382 (1st Cir. 1989); *Batista v. Rodriguez*, 702 F.2d 393, 397-398 (2nd Cir. 1983); *Losch v. Borough of Parkesburg*, 736 F.2d 903, 910 (3rd Cir. 1984); *Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987), *cert. denied sub nom. City of Fayetteville, N.C. v. Spell*, 484 U.S. 1027 (1988); *Berry v. McLemore*, 670 F.2d 30 (5th Cir. 1982), *overruled on other grounds, Interñational Woodworkers of America v. Champion International Corporation*, 790 F.2d 1174, 1181

(5th Cir. 1986); *Harris v. City of Pagedale*, 821 F.2d 499 (8th Cir. 1986) *cert. den'd* 484 U.S. 986 (1987); *Davis v. City of Ellensburg*, 869 F.2d 1230, 1233-1235 (9th Cir. 1989); *Cowdrey v. City of Eastborough*, 730 F.2d 1376, 1379 (10th Cir. 1984); and *Depew v. City of St. Marys*, 787 F.2d 1496, 1499 (11th Cir. 1986).

Petitioners cite only three cases in their Petition which they contend are conflicting opinions. They attempt to manufacture this alleged conflict by quoting out-of-context one or two sentences from each case. These three cases are easily distinguishable from Petitioners' case and Arlington asserts that they do not represent a conflict among the circuits.

For example, in *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987) cited by Petitioners, the evidence did not show a single incident involving a single police officer. In fact, the Fifth Circuit in *Grandstaff* acknowledged that, under *Tuttle*, isolated incidents of police misconduct are inadequate to prove the knowledge and acquiescence of a municipal policymaker in the manner of the misbehavior. *Id.* at 171. However, the evidence showed several repeated acts of abuse committed by several police officers in several episodes. The entire six officers of the night shift of the police department were involved in these acts. The Fifth Circuit concluded that this widespread misconduct tended "to prove a disposition to disregard human life and safety so prevalent as to be police policy or custom." *Id.* Given the widespread participation of the officers in the gross misbehavior and dangerous recklessness and the police chief's failure to take subsequent disciplinary or corrective measures, a jury could find that dangerous

recklessness on the part of these police officers was "accepted as the way things are done and have been done in the City of Borger". *Id.*

The facts of the case before the Court are different in several respects. The pleadings and summary judgment evidence show only one Arlington police officer involved in a single act of alleged misconduct, that is, the shooting of Fraire. There is no evidence of repeated acts of abuse by several Arlington police officers in several episodes leading to the shooting of Fraire. There is nothing about the shooting of Fraire by Lowery which would lead Chief Kunkle to believe that dangerous recklessness and police misconduct were rampant throughout the Arlington Police Department and that some disciplinary action was required.

Further, the holding in *Grandstaff* has been limited to its facts by the Fifth Circuit in *Coon v. Ledbetter*, 780 F.2d 1158 (5th Cir. 1986). *See also, Stokes v. Bullins*, 844 F.2d 269, 274 n. 8 (5th Cir. 1988). In *Coon*, the court specifically rejected the plaintiff's argument that, under *Grandstaff*, the county could be held liable because the sheriff ratified his deputies' conduct after the event:

> *Grandstaff*, however, does *not* stand for the broad proposition that if a policymaker defends his subordinates and if those subordinates are later found to have broken the law, then the illegal behavior can be assumed to have resulted from an official policy. Rather, *Grandstaff* affirmed a judgment against a Texas city on a highly peculiar set of facts. The *Grandstaff* panel emphasized the extraordinary facts of the case, and its analysis can be applied only to equally extreme factual situations.

Coon, at 1161 (emphasis in original). Therefore, *Grandstaff* clearly does not support Petitioners' claim that a municipal policy can be inferred from a single failure to discipline a single police officer for a single incident of misconduct and does not conflict with other circuits.

The Ninth Circuit's holding in *McRorie v. Shimoda*, 795 F.2d 780 (9th Cir. 1986) is similar to *Grandstaff*. In *McRorie*, a prison guard brutalized a prisoner during a strip search after a shakedown at the prison. The prisoner alleged that this was not an isolated attack but that prison guards injured him and 28 other inmates at the same time and one guard was acting under the orders of his supervisors. There were no facts produced by the defendants about how or whether prison officials responded to these incidents of alleged abuse. *Id.* at 782-784. Unlike the case before the Court, the prisoner in *McRorie* claimed several incidents involving several government employees. *McRorie* clearly does not support Petitioners' theory of their case and does not conflict with the prevailing view in the federal circuits.

Finally, in *Slakan v. Porter*, 737 S.W.2d 368 (4th Cir. 1984), a prisoner filed suit against three guards and three high-ranking prison supervisory officials for brutality. At trial, there was evidence of several prior acts of misconduct of which supervisors were aware and about which they did nothing. First, this is not a municipal or governmental liability case but rather a supervisory liability case. *Id.* at 372-3. The liability of the governmental entity, if any, is not discussed. Second, the Fourth Circuit recognizes that a plaintiff "cannot satisfy his burden of proof by pointing to a single incident or isolated incidents." Supervisory liability requires evidence of "continued

inaction in the face of documented widespread abuses." *Id.* This opinion is not in conflict but is, in fact, clearly consistent with the Fifth Circuit opinion in *Fraire* and the other cases cited above.

C. There is no evidence that Arlington failed to investigate the shooting of Fraire objectively and impartially.

Petitioner also requests *certiorari* because, they assert, "a municipality's failure to objectively and impartially investigate the conduct of its own employees . . . should entail the potential for civil liability."

First, there is no evidence that the Fraire shooting was not impartially or objectively investigated. During the preceding sixteen months of discovery, the entire internal investigation was produced. There were no discovery battles in this lawsuit where Arlington sought to protect the investigation from discovery. Petitioners concede that detailed written statements were taken from Lowery and other witnesses and that a detailed written report of the investigation was prepared. The investigation was in fact thorough and detailed. Petitioners do not point in their Petition to anything the police department should have done differently in its investigation, other than to arrive at a different conclusion.

Second, Petitioners' bald allegations and conjecture that Lowery was not telling the truth, that Arlington knew Lowery was not being truthful, that Lowery "manufactured a scenario" and that the internal affairs investigation report refutes Lowery's version of the incident have no basis in fact and are completely unsupported by

any evidence in the record. Petitioners' assertion that the internal affairs report refutes Lowery's version is particularly ludicrous in light of the conclusion that Lowery acted in self-defense in conformity with Arlington's written deadly force policy and Texas law.

Third, in requesting *certiorari* for this reason, Petitioners seek to expand municipal liability under Section 1983 and to open the federal courts to reviewing every police internal affairs investigation where a plaintiff alleges an incorrect decision was made. Under Petitioners' proposal, every alleged unreasonable, incorrect or unwise disciplinary decision made by a police chief should subject a municipality to potential liability under Section 1983, even for a single isolated incident of alleged illegality. The effect of Petitioners' proposal would be to impose liability on municipalities based upon *respondent superior* and to eliminate the causation element from causes of action under Section 1983. Such a strict liability standard has been rejected by this Court in *Monell* and subsequent Section 1983 cases and should continue to be rejected.

Lastly, Petitioners' real complaint here is they do not agree with the conclusions of Arlington's investigation. They want this Court to believe that there was no justification for the findings of the police investigation and that these findings are wrong. The investigation of this shooting has now been studied and analyzed by two objective and impartial bodies – the district court and the Fifth Circuit. Each court has objectively and impartially examined the record, including the same statements examined by the internal affairs investigation and Chief Kunkle, and has come to the same conclusion – Lowery

was reasonable in his belief that the shooting of Fraire was reasonably and immediately necessary to protect his own life. How, then, can Arlington's conclusions and findings be so unreasonable and unjustified?

III. CONCLUSION

Therefore, for the reasons cited above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

GREGORY S. NORRIS
State Bar No. 15090300
Assistant City Attorney

Arlington City Attorney's Office
Post Office Box 231
Arlington, Texas 76004-0231
(817) 459-6878
FAX (817) 459-6897
Counsel of Record for
Respondent City of Arlington

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No. 92-393

In The

Supreme Court of the United States

October Term, 1992

MARIA DEL ROSARIO C. FRAIRE, Individually and as Next Friend for MYRA FRAIRE and JUAN ANTONIO FRAIRE, Minor Children, and JOSEFA ESQUIVEL FRAIRE,

Petitioners,

v.

CITY OF ARLINGTON and JAMES W. LOWERY, JR.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENT JAMES W. LOWERY, JR.

GARY D. EISENSTAT
Counsel for Respondent James W. Lowery, Jr.

FIGARI & DAVENPORT, L.L.P.
4800 NationsBank Plaza
901 Main Street
Dallas, TX 75202
(214) 939-2000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTIONS PRESENTED

1. Whether a conflict exists among the circuit courts regarding a police officer's right to invoke the defense of qualified immunity to an excessive-force claim brought under the Fourth Amendment.

2. Whether the Court should overrule last term's decision of *Hunter v. Bryant*, ___ U.S. ___, 112 S. Ct. 534 (1991), and over twenty years of related jurisprudence and abolish the qualified-immunity defense in the context of excessive-force claims brought under the Fourth Amendment.

3. Whether Petitioners have waived their right to challenge the availability of the qualified-immunity defense to an excessive-force claim under the Fourth Amendment.

4. Whether Lowery's use of deadly force to preserve his own life and the safety of innocent bystanders constituted an unreasonable use of force under the Fourth Amendment.

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FOREWORD

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Unless otherwise indicated, all emphases are supplied by counsel.

No. 92-393

In The

Supreme Court of the United States

October Term, 1992

MARIA DEL ROSARIO C. FRAIRE, Individually and as Next Friend for MYRA FRAIRE and JUAN ANTONIO FRAIRE, Minor Children, and JOSEFA ESQUIVEL FRAIRE,

Petitioners,

v.

CITY OF ARLINGTON and JAMES W. LOWERY, JR.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENT JAMES W. LOWERY, JR.

Respondent James W. Lowery, Jr. ("Lowery") requests that this Court deny the Petition for Writ of Certiorari ("Petition") of Maria del Rosario C. Fraire, Individually and as Next Friend for Myra Fraire and Juan Antonio Fraire, minor children, and Josefa Esquivel Fraire (collectively, "Petitioners") seeking review of the Fifth Circuit's opinion in this case reported at 957 F.2d 1268 (5th Cir. 1992).

STATEMENT OF THE CASE

This is an action for damages under 42 U.S.C. section 1983 brought by Petitioners, the survivors of Javier Fraire ("Fraire"), against the City of Arlington, Texas ("City"), and Lowery, a police officer for the City, for alleged use of excessive force. Petitioners' claims arise out of an incident that occurred on November 22, 1987, in which Lowery shot Fraire in self-defense, and not--as Petitioners allege--simply for driving while intoxicated.

For purposes of brevity, and to avoid any inference under Supreme Court Rule 15.1 that Lowery accepts Petitioners' statement of the case as true, Lowery directs the Court to the Fifth Circuit's detailed recitation of the facts as stated in its published opinion. *Fraire v. City of Arlington*, 957 F.2d 1268, 1272 (5th Cir. 1992). Additionally, because Petitioners' statement of the case omits certain crucial facts and blatantly distorts others, a brief discussion of two key points is necessary.

A. Fraire Knew Lowery Was a Police Officer.

Although the record is replete with evidence to the contrary, Petitioners allege that Lowery never properly identified himself to Fraire as a law enforcement officer. Therefore, since Lowery was dressed in plain clothes, Petitioners suggest that Fraire did not know that Lowery was a police officer. Apparently, Petitioners believe that this "fact" somehow justifies Fraire's refusal to follow Lowery's repeated demands to stop his truck. However, as the district court correctly held, "[t]here is no genuine dispute that Fraire knew Lowery was a law enforcement officer for a period of time before he made his fatal

decision to drive his pickup toward Lowery." (R. Vol. II, p. 537 (footnote omitted).) This finding is well supported by the record.

First, when Fraire turned right off of Collins Road and onto Woodbrook Street, he pulled into the driveway of the first house at the top of Woodbrook Street and stopped—hoping Lowery would then drive by. (R. Vol. III, p. 565.) Obviously, Fraire did so solely to trick Lowery because he knew Lowery was a police officer.[1]

Second, after this ploy failed, Fraire backed out of this driveway, nearly hitting Lowery. As Fraire sped down Woodbrook Street, he told his passenger, Jose Rodriguez ("Rodriguez"), that he (Fraire) had problems with a "DWI" and even asked Rodriguez to drive. (R. Vol. II, pp. 500; R. Vol. III, p. 565.) This admission further demonstrates that Fraire recognized that Lowery was a police officer who could arrest him for drinking and driving—an offense that Fraire knew was in direct violation of his probation and could land him in jail. (R. Vol. I, p. 276; R. Vol. II, pp. 500-01; R. Vol. III, p. 565.)

---

[1] Lowery testified that once Fraire stopped in the driveway, Lowery approached the truck and identified himself as a police officer, both orally and with his badge. When Lowery was standing at the passenger's side of the truck, he again identified himself as a police officer and observed Fraire take an open beer can and place it on the floor. Lowery identified himself for a third time as a police officer and told Fraire to put the truck in park and turn off the ignition. In response, Fraire admitted, "I am sorry, I didn't mean to do it. It won't happen again, I promise." When Lowery repeated his request for Fraire to put the truck in park and turn off the ignition, Fraire instead put the truck in reverse and backed out of the driveway. 957 F.2d at 1270.

Third, when Fraire reached the end of Woodbrook Street, he crashed his truck several feet up onto a neighbor's lawn in his effort to flee from Lowery. Fraire then instructed Rodriguez to throw the open beer cans out the window of the truck—a fact that Petitioners conveniently ignore. (Rodriguez told police after the shooting, "I also recall that he [Fraire] was scared and told me to throw a beer away.") (R. Vol. II, p. 501; Vol. III, p. 569.)

Fourth, Lowery testified in his affidavit--without contradiction--that he identified himself to Fraire on numerous occasions as a police officer. Specifically (and even ignoring Lowery's first encounter and discussion with Fraire at the top of Woodbrook Street), when Lowery entered Creekmere Court, the cul-de-sac where Fraire had finally stopped, Lowery exited his car, removed his badge, and displayed it to Fraire and Rodriguez. (R. Vol. I, p. 282.) Additionally, and notwithstanding Petitioners' outrageous allegations to the contrary, Lowery also repeatedly identified himself verbally as a police officer. As the Fifth Circuit held and the record shows, this fact is confirmed by almost every witness who gave a statement to the police after the shooting. 957 F.2d at 1271-72, 1274. (R. Vol. I, pp. 274, 282, 278-79; R. Vol. III, pp. 596, 598, 602, 607.)[2]

Finally, Rodriguez told the police in his interview immediately after the shooting that Fraire *knew* Lowery was a police officer:

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[2] Even Rodriguez does not deny that Lowery identified himself as a police officer, and admits in his affidavit that he heard Lowery yell "Stop!" (R. Vol. III, p. 558.)

> Q. I know we talked about this before . . . How did Javier know that he [Lowery] was a police officer. The way he was dressed? How did Javier know?
>
> A. I really don't know maybe because of the vehicle.

(R. Vol. III, p. 570.)

Obviously then, Petitioners' assertion that Lowery "never displayed any identification or properly identified his status as a law enforcement officer with [the City]" is, bluntly stated, false. (Petition at 3.)

B. Lowery Shot Fraire in Self-Defense.

Petitioners also allege that Lowery did not shoot Fraire in self-defense. Not surprisingly, the Fifth Circuit disagreed, holding: "Although all of the final action occurred in a matter of seconds, there can be no doubt that Lowery's act was one of virtual instinctive self-preservation in no way related to his original concerns with the open container laws, a concern by then long since evaporated." 957 F.2d 1275.[3] This statement is also well supported by the record.

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[3] The trial court reached a similar conclusion: "When . . . Lowery's physical safety became imperiled, his response by gunfire could be thought by a reasonable officer to be an appropriate and reasonable one. Obviously, no reasonable officer would intentionally kill an intoxicated driver just to put an end to his drunken journey. This case is not so simple." (R. Vol. II, pp. 537-38.)

Lowery testified—again without contradiction—that he "feared for his life" as Fraire headed toward him in the truck. (R. Vol. I, pp. 278-79.) This fear was justified based upon Fraire's prior actions of speeding down Woodbrook Street, stopping only when he crashed the truck against the curb onto a neighbor's yard, then backing up, nearly ramming Lowery's car, speeding off again, and then driving directly at Lowery when he was on foot. (R. Vol. I, pp. 276-77, 282, 278-80.) As one eyewitness recalled:

> The truck was heading right toward the detective and it looked like the driver of the truck was trying to run over the detective with the truck. I saw the detective holding a handgun with both hands out in front of him. I heard the detective shout "hault" [sic]. . . . The detective didn't shoot at first. He stood there for a while with his gun pointed at the truck while the truck was still headed right for the detective at a fast speed. The truck got closer and closer to the detective and the detective shot his gun one time at the truck when the truck was about ten or fifteen feet away from the detective. The truck was going to run right over the detective if the detective didn't do something and I don't know if the detective would have had time to even jump out of the way or not because the truck was going so fast and was so close to hitting the detective.

(R. Vol. III, p. 601.) When asked immediately afterwards if he thought Fraire was going to hit or run over Lowery, even Rodriguez conceded that "it was close." (R. Vol. III, p. 568.) Therefore, when Fraire refused to stop or alter his path, Lowery was forced to shoot in self-defense.

With these facts in mind, the Court should deny the Petition for any of the reasons set forth below.

REASONS FOR DENYING THE PETITION FOR WRIT

I.

The Court Should Deny the Petition Because No Conflict Exists Among the Circuit Courts Regarding the Qualified-Immunity Defense in the Context of an Excessive-Force Claim Under the Fourth Amendment.

Petitioners contend that a conflict exists among the circuits regarding whether a law enforcement officer may claim qualified immunity in the context of a claim for excessive force under the Fourth Amendment, and that *Graham v. Connor*, 490 U.S. 386 (1989) did not resolve that alleged conflict. (Petition pp. 23-28.)[4] However, as the following analysis demonstrates, no conflict exists among the circuits, either generally within the area of excessive

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[4] Petitioners state that this Court "left open" the question of whether a qualified-immunity defense is available to a law enforcement officer in the face of an excessive-force claim. More precisely, however, because qualified immunity had not been pled in *Graham*, the Court stated that it expressed no view regarding its proper application in excessive force cases arising under the Fourth Amendment. 490 U.S. at 399 n.12. However, the Court in *Graham* expressly contemplated the application of the qualified-immunity defense to excessive-force claims, holding that "the officer's *objective* 'good faith'—that is, whether he could reasonably have believed that the force used did not violate the Fourth Amendment—may be relevant to the availability of the qualified immunity defense to monetary liability under § 1983." *Id.* (emphasis in original). *Accord Brown v. Glossip*, 878 F.2d 871, 873 n.3 (5th Cir. 1989).

force or specifically considering other cases with similar facts.

A. No Conflict Exists Among the Circuits Regarding Whether Qualified Immunity Is a Viable Defense to an Excessive-Force Claim Under the Fourth Amendment.

1. A Survey of the Circuits.

In *Dean v. City of Worcester*, 924 F.2d 364 (1st Cir. 1991), the First Circuit affirmed summary judgment in favor of two police officers based upon a qualified-immunity defense to an excessive-force claim arising out of injuries the plaintiff sustained in the course of an arrest based upon mistaken identity. Similarly, in *Finnegan v. Fountain*, 915 F.2d 817 (2d Cir. 1990), the Second Circuit held that a police officer may rely upon qualified immunity as a defense to a claim of excessive force arising in the context of effectuating an arrest.

Although the Third Circuit appears to have never addressed the issue, in *Slattery v. Rizzo*, 939 F.2d 213 (4th Cir. 1991), retired United States Associate Supreme Court Justice Powell, sitting by designation for the Fourth Circuit, wrote that:

> There is no principled reason not to allow a defense of qualified immunity in an excessive use of force claim, when it is allowed in other actions alleging violations of the fourth amendment. The interests served by the principle of qualified immunity are present in all suits alleging violations of the fourth amendment.

Id. at 215. As a result, the Fourth Circuit held that the police officer was qualifiedly immune from an excessive-force claim brought by a suspect whom the officer had shot during an arrest.

The Fifth Circuit has obviously held in this and other cases that qualified immunity is a valid defense to an excessive-force claim. *See, e.g., Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991), and *Young v. City of Killeen*, 775 F.2d 1349 (5th Cir. 1985).

Although the Second Circuit in *Finnegan v. Fountain*[5] and the Fourth Circuit in *Slattery v. Rizzo*[6] have previously suggested that the Sixth Circuit does not recognize qualified immunity as a defense to an excessive-force claim,[7] the Sixth Circuit's subsequent decision in *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1954 (1992), discussed in detail below,

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[5] 915 F.2d at 822.

[6] 939 F.2d at 215.

[7] This suggestion is based upon the Sixth Circuit's pre-*Graham* decision in *Holt v. Artis*, 843 F.2d 242 (6th Cir. 1988). However, *Holt* does not hold that qualified immunity is never available as a defense to an excessive-force claim; rather, it holds that under the facts of that case, the trial court should have concluded that immunity did not exist and therefore should not have presented the jury with an instruction on the good-faith issue. Moreover, even if one construes *Holt* as holding that the defense of qualified immunity is unavailable as a matter of law in excessive-force cases, the Sixth Circuit's subsequent holding in *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1954 (1992), indicates that the Sixth Circuit no longer adheres to the position stated in *Holt*, following this Court's decision in *Graham v. Connor*.

demonstrates that the Sixth Circuit does recognize qualified immunity as a defense to an excessive-force claim. Specifically, the court in *Smith* affirmed a summary judgment decision in favor of the police officer based upon the officer's assertion of qualified immunity as a defense to an excessive-force claim under the Fourth Amendment.

In *Klein v. Ryan*, 847 F.2d 368 (7th Cir. 1988), also discussed in detail below, and again in *Chathas v. Smith*, 884 F.2d 980 (7th Cir. 1989), *cert. denied*, 493 U.S. 1095 (1990), which is based upon *Graham v. Connor*, the Seventh Circuit similarly recognized that qualified immunity is a viable defense to an excessive-force claim.

Both the Eighth and Ninth Circuits have adopted this position as well. *See, e.g., Fitzgerald v. Patrick*, 927 F.2d 1037 (8th Cir. 1991) (affirming summary judgment in favor of a police officer based upon a defense of qualified immunity in the context of an excessive-force claim); *Hopkins v. Andaya*, 958 F.2d 881, 885 n.3 (9th Cir. 1992) ("Police officers are entitled to assert a defense of qualified immunity from section 1983 liability if they reasonably believed in good faith that their actions were constitutional."). *Accord Thorsted v. Kelly*, 858 F.2d 571 (9th Cir. 1988).

Additionally, in *Hannula v. City of Lakewood*, 907 F.2d 129 (10th Cir. 1990), the Tenth Circuit reversed a trial court's decision denying a police officer's motion for summary judgment based upon qualified immunity and ordered the trial court to enter summary judgment in favor of the officer on the basis of a qualified-immunity defense to an excessive-force claim.

Finally, both the Eleventh and the District of Columbia Circuits have held that qualified immunity is a valid defense to an excessive-force claim. *See Hamm v. Powell*, 874 F.2d 766 (11th Cir. 1989), modified and reaffirmed in light of *Graham v. Connor* at 893 F.2d 293 (11th Cir. 1990), *cert. denied*, ___ U.S. ___, 110 S. Ct. 3218 (1990); *Hunter v. District of Columbia*, 943 F.2d 69 (D.C. Cir. 1991).[8]

Therefore, as these cases demonstrate, the Court should deny the Petition because no conflict exists among the circuits regarding the availability of the qualified-immunity defense to a claim of excessive force under the Fourth Amendment. To the contrary, all circuits that have addressed the issue have found that qualified immunity is a viable defense to excessive-force claims under the Fourth Amendment.

2. Petitioners Confuse the Availability of Qualified Immunity With Its Applicability Under Certain Circumstances.

Notwithstanding all of the foregoing cases, Petitioners argue that a conflict exists among the circuits because, in certain cases, courts have not permitted defendants to succeed on their defense of qualified immunity. However, this alleged confusion results solely because of the imprecision with which Petitioners have framed the issues. Specifically, Petitioners confuse (1)

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[8] The Federal Circuit does not appear to have even addressed the issue of qualified immunity and excessive force or rendered an opinion on the subject, which is not surprising since that court is one of limited jurisdiction. *See* 28 U.S.C. § 1295.

whether qualified immunity is available in the first instance to a defendant in the face of an excessive-force claim, with (2) whether a defendant is entitled to claim qualified immunity at a particular stage of the litigation or in light of the particular facts and circumstances of the case. The preceding survey of cases demonstrates that the answer to the first issue is in the affirmative; and the following analysis shows that, when analyzed properly, no confusion exists among the circuits with respect to the second issue.

Petitioners suggest that certain post-*Graham* cases, such as *Dixon v. Richer*, 922 F.2d 1456 (10th Cir. 1991) and *Jackson v. Hoylman*, 933 F.2d 401 (6th Cir. 1991), stand for the proposition that qualified immunity is no longer a viable defense to an excessive-force claim under the Fourth Amendment. Petitioners misstate the law. Although the court in *Dixon* held that the trial court correctly denied the officers' motion for summary judgment on the ground of qualified immunity because of the vastly conflicting summary judgment evidence, the court also held that its decision did not preclude the officers from reasserting their qualified-immunity defense at and after trial when the factual disputes had been resolved. 922 F.2d at 1463. In other words, *Dixon* and cases like it, such as *Jackson v. Hoylman*, only stand for the proposition that if a genuine fact issue exists, it is improper under FED. R. CIV. P. 56 to grant summary judgment. However, none of these cases hold that qualified immunity is never a viable defense to an excessive-force claim under the Fourth Amendment.

Although wholly inapplicable to this case, Petitioners correctly note that some courts have refused to allow a

qualified-immunity defense following a finding of excessive force in violation of the Fourth Amendment where the relevant law is clearly established. *See, e.g., Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991), *petition for cert. filed*, 61 U.S.L.W. 3062 (U.S. July 1, 1992) (No. 92-137); *Street v. Parhem*, 929 F.2d 537 (10th Cir. 1991). This result is logical for post-*Graham* cases because, ignoring for the moment the "clearly established law" prong of the qualified-immunity defense, some courts have concluded that the "reasonableness" prong of the qualified-immunity defense necessarily involves an inquiry into the same facts as the "reasonableness" element of a Fourth Amendment excessive-force claim under *Graham v. Connor*. Accordingly, those courts have held that a finding of unreasonable force under the Fourth Amendment necessarily addresses the reasonableness element of a post-*Graham* qualified-immunity defense and renders that defense inapplicable in such situations.

However, the Court should not and need not grant the Petition regarding this issue because cases such as *Curnow* and *Street* are consistent with the Fifth Circuit's decision in this case. As discussed below, the difference between those cases and the present action is that no genuine fact issue exists regarding the reasonableness of Lowery's actions under the circumstances. More importantly, however, no court—including the Fifth Circuit in this case—has held that a police officer's use of force was unreasonable under the Fourth Amendment, but was nonetheless reasonable for purposes of qualified immunity.[9] Certainly, Petitioners have not cited any cases

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[9] Again, this analysis assumes that the "clearly established law" prong of the qualified immunity defense is not at issue.

reaching this conclusion. Therefore, no conflict exists among the circuits on this point.[10]

B. No Conflict Exists Among the Circuits Regarding an Officer's Right to Use Deadly Force in the Face of a Threat to His Own Life or the Safety of Others.

Additionally, when examining the Fifth Circuit's decision in light of other cases involving similar facts, it becomes even more clear that no conflict exists among the circuits regarding an officer's right to use deadly force when faced with a life-threatening situation. In this case, the Fifth Circuit correctly determined that Lowery was qualifiedly immune because he had probable cause to believe that Fraire posed a threat of serious physical harm to Lowery and others, and therefore deadly force

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[10] Independent of the above, and even assuming such a conflict did exist, the Court should still not grant the Petition in this case because Lowery's actions occurred in November 1987 --two years before the Court's decision in *Graham*. Accordingly, the excessive-force test under the Fourth Amendment involves a legal inquiry that is appropriately different from the applicable qualified-immunity test, which examines the reasonableness of Lowery's conduct in light of clearly established law at the time, i.e., in 1987. At that time, *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. Unit A Jan. 1981), which represented the state of the law regarding excessive force, required a substantive due process analysis under the Fourteenth Amendment that also included a subjective "malice" element. Thus, even if the Court were otherwise inclined to grant the Petition, this case is inappropriate for certiorari because the Fifth Circuit was required to analyze Lowery's actions--for qualified immunity purposes--under the *Shillingford* test. Therefore, any decision by this Court regarding excessive force would be of limited precedential value.

was justified under the circumstances. 957 F.2d 1275-77. This conclusion is proper in light of the Court's holding in *Tennessee v. Garner*, 471 U.S. 1, 11 (1985), that it is not constitutionally unreasonable to use deadly force "[w]here the officer has probable cause to believe the suspect poses a threat of serious physical harm, either to the officer or to others." Other courts faced with similar facts and claims have reached the same result.

1. The Sixth Circuit's View.

As stated above, Petitioners and the Second and Fourth Circuits have suggested that the Sixth Circuit does not recognize qualified immunity as a defense to an excessive-force claim. However, that court's recent decision in *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992), *cert. denied*, 112 S. Ct. 1954 (1992), which is remarkably similar to this case, makes it clear that the Sixth Circuit does recognize qualified immunity as a viable defense to a Fourth Amendment excessive-force claim.

In *Smith*, a police officer observed a suspect, Smith, run a stop sign—a traffic offense far less serious than Fraire's driving while intoxicated. As a result, the officer gave chase. Like Fraire did here, Smith attempted to flee, leading police on a high-speed chase reaching speeds in excess of ninety miles per hour. *Id.* at 344. At one point, Smith—like Fraire—entered a residential neighborhood and found himself on a dead-end street. As Smith attempted to turn his vehicle around, the officer exited his car and walked toward Smith's car in an attempt to arrest Smith and remove him from the vehicle. However, as the officer approached Smith's car on foot:

> Suddenly, Mr. Smith backed up his car, then sped forward and crashed into Officer Schulcz's car. He backed up again and zoomed around the police car, smashing into the fence and gate as he did so. As Mr. Smith's car drove *past*, Officer Schulcz pulled his gun and fired one shot at it. The bullet entered the passenger side of the car, pierced the passenger seat, then struck Mr. Smith in the right side, killing him.

Id. Based upon these facts, the suspect's mother brought suit against the officer, the city, and its acting police chief under 42 U.S.C. section 1983 for excessive force and for violations of the Ohio wrongful death statute. The Sixth Circuit affirmed a summary judgment in favor of the police officer based upon a defense of qualified immunity and held that the officer did not violate Smith's constitutional rights. *Id.* at 347.

The *Smith* case is significant for three reasons. First, the police officer did not shoot until *after* Smith drove by. It therefore appears that the officer did not necessarily shoot Smith to preserve his own life, as Lowery did here. Even under these circumstances, the court found that the officer's use of force was reasonable under *Tennessee v. Garner* because deadly force was required to prevent injury to others. *Id.* at 347-48. Second, the court in *Smith* held that the officer did not use excessive force, even though his actions—unlike Lowery's—were found to have violated that city's internal deadly-force policies. *Id.* Finally, last term this Court declined to grant a petition for writ of certiorari in the *Smith* case and there is nothing that distinguishes this case from *Smith*, either factually or legally, that would warrant a different result here.

2. The Seventh Circuit's View.

Similarly, in *Klein v. Ryan*, 847 F.2d 368 (7th Cir. 1988), a business owner complained to police that someone was stealing money from his laundromat. The police determined that William Klein ("Klein") was responsible for the thefts and placed the laundromat under surveillance. The officers then observed Klein taking money from the laundromat. As Klein left the laundromat with the stolen money, Officer Lawrence Ryan ("Ryan"), who—like Lowery—was dressed in plain clothes, identified himself as a police officer and told Klein to stop. Klein dropped the money, ran to his car, and attempted to escape. As Klein drove away, another officer, Frank Lombardo ("Lombardo"), who was standing behind Klein's car, shot at Klein's car in self-defense, believing that Klein was attempting to run him over. Ryan also shot at the car, although neither officer's shots stopped Klein from fleeing. The police subsequently arrested Klein at a local hospital when he sought medical treatment for an injury he sustained, apparently from one of Lombardo's shotgun blasts. Klein then sued Ryan and Lombardo under 42 U.S.C. section 1983 for use of excessive force under the Fourth Amendment. *Id.* at 369-71.

The Seventh Circuit affirmed summary judgment in favor of the police officers on the ground of qualified immunity because the officers did not violate clearly established law at the time. *Id.* at 375. This pre-*Graham v. Connor* decision is significant because Klein was unarmed and claimed that he did not hear Ryan identify himself as a police officer. Even accepting Klein's statements as true, the court still concluded that the officers' use of deadly

force was reasonable in light of clearly established law at the time. *Id.* at 375.

Therefore, the Court should also deny the Petition because the Fifth Circuit's decision below is consistent both with its other decisions[11] and with those of the Sixth and Seventh Circuits based upon similar facts. None of the cases Petitioners cite require or even suggest a contrary result.

II.

Any Alleged Conflict That Exists Among the Circuits Is Resolved by *Siegert v. Gilley* and *Hunter v. Bryant*.

Petitioners next ask the Court to grant certiorari because the lower courts are allegedly unclear as to what standard to apply when resolving the issue of qualified immunity in the context of an excessive-force claim. However, for the reasons stated immediately above, this confusion appears to exist more with the Petitioners than it does in the case law. Moreover, to the extent any such confusion did exist, it has been resolved by this Court's recent decisions in *Siegert v. Gilley*, ___ U.S. ___, 111 S. Ct. 1789 (1991), and *Hunter v. Bryant*, ___ U.S. ___, 112 S. Ct. 534 (1991), both of which decisions Petitioners ignore.

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[11] *See Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991), and *Young v. City of Killeen*, 775 F.2d 1349 (5th Cir. 1985), both of which involved facts similar to those in this case.

A. The Analysis in *Siegert*--Whether a Constitutionally Protected Right Exists.

Last year, the Court in *Siegert* held that in the context of a claim for qualified immunity, the initial inquiry is whether a constitutionally protected right even exists. If no such right exists, *Siegert* holds that a court need not even reach the issue of qualified immunity. 111 S. Ct. at 1793-94. Accordingly, the Court in *Siegert* declined to reach the question of qualified immunity, having previously concluded that the plaintiff's claim did not rise to the level of constitutionally protected or recognized right. *Id.* at 1793-94.

B. The Analysis Under *Hunter*—Whether the Officer's Actions Were Reasonable in Light of Clearly Established Law at the Time.

If a constitutionally protected right exists, *Hunter v. Bryant* requires that a court next decide the legal question of whether a defendant may prevail on a qualified-immunity defense. In *Hunter*, the Court reaffirmed that a police officer, such as Lowery, may rely upon the defense of qualified immunity if a reasonable officer could have believed his actions to be lawful in light of clearly established law and the information the officer possessed. 112 S. Ct. at 536. Additionally, the Court reiterated that qualified immunity is more than a defense to liability, it is "*immunity from suit*," and its applicability must be resolved at the earliest possible phase of the litigation. *Id.* (emphasis in original). If qualified immunity is not applicable under the circumstances or may not be resolved by motion practice because of factual disputes, the court

should then determine whether a constitutional violation has occurred.

C. The Qualified Immunity Analysis—As Applied to Excessive-Force Claims.

Accordingly, in the context of an excessive-force claim, *Siegert* first requires a court to determine whether a constitutionally protected right exists, which it obviously does under the Fourth Amendment. *Hunter* then requires a court to determine whether qualified immunity applies by asking "whether the [officer] acted reasonably under well settled law in the circumstances." 112 S. Ct. at 537. The qualified-immunity inquiry thus entails a two-step analysis: (1) whether the officer acted reasonably under the circumstances, (2) in light of clearly settled law *at the time*. Here, consistent with *Hunter*, the Fifth Circuit correctly examined the reasonableness of Lowery's actions in light of its prior holding in *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. Unit A Jan. 1981), which represented the state of the law that existed in November 1987 in the Fifth Circuit regarding excessive force.

Therefore, any alleged confusion among the circuits regarding what standard to apply (which Lowery does not concede exists) is necessarily resolved by the holding in *Hunter*. Courts must examine the state of the law *at the time of the incident* to determine whether it was clearly established and whether the officer's actions were reasonable in light thereof.[12] Petitioners have not cited a

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[12] If a court then determines that qualified immunity does not apply at an initial stage of the litigation, either because a

single case in which a court has strayed from this analysis, and the Court should therefore also deny the Petition in light of *Hunter*.

III.

The Court Should Not Destroy the Defense of Qualified Immunity for Law Enforcement Officers.

Notwithstanding *Hunter*, Petitioners also contend that the Court should grant their Petition because (1) "the rationales underlying qualified immunity for public officials are not applicable to law enforcement officers, . . ." and (2) the reasonableness standard for qualified immunity in excessive-force cases under the Fourth Amendment is exactly the same as that enunciated in *Graham*. (Petition at 30-33.) Specifically, Petitioners argue that the Court should extend its very limited and narrow holding in *Wyatt v. Cole*, ___ U.S. ___, 112 S. Ct. 1827 (1992) (declining to extend qualified immunity to private citizens) to abolish the qualified-immunity defense for law enforcement officers. For the following reasons, the Court should decline the invitation.

First, for the Court to adopt Petitioners' view, it would necessarily be required to overrule *Hunter* and over twenty years of qualified-immunity jurisprudence. The Court has repeatedly held that qualified immunity is

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material fact question exists under FED. R. CIV. P. 56, or because the officer's actions were not reasonable in light of clearly established law at the time, the officer's actions should then either be reexamined once all material factual disputes have been resolved or analyzed under the excessive-force test announced in *Graham*.

not only a defense to liability, it is "an *immunity from suit*" and therefore must be resolved at the earliest possible moment in the litigation to avoid the very expense that Petitioners now seek to force upon police officers such as Lowery. *Hunter v. Bryant*, 112 S. Ct. at 536. However, Petitioners' view ignores these holdings and would subject police officers to all the trappings of civil litigation—such as protracted discovery—from which they are otherwise shielded under the qualified-immunity defense. Petitioners would also deprive police officers of their right to an interlocutory appeal regarding qualified immunity as permitted under *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Indeed, one need only read the detailed policy discussion regarding qualified immunity in *Wyatt* to conclude that Petitioners' suggestion of abolishing that defense is absurd. 112 S. Ct. at 1831-33 ("[W]e have recognized qualified immunity for government officials where it was necessary to preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damage suits from entering public service."). *Accord Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991) ("[Q]ualified immunity affords government officials greater protection than a simple defense on the merits. [T]he purpose of qualified immunity is to remove most civil actions, except those where the official clearly broke the law, from the legal process well in advance of the submission of facts to a jury."). Petitioners have offered no persuasive authority or policy reason that would justify such a drastic change in the law.

Second, and even accepting Petitioners' argument that the "reasonableness" element of the qualified-immunity defense involves inquiries similar to those of the "reasonableness" element of an excessive-force claim, the Court should still not abolish the qualified-immunity defense for police officers, as to do so would cause all police officers to hesitate to make the very type of split-second decisions that Lowery was forced to make in this case to save his life. *See Gooden v. Howard County, Maryland*, 954 F.2d 960, 964 (4th Cir. 1992) (holding that the purpose of qualified immunity is to afford "police officers latitude in exercising what are inescapably discretionary functions replete with close judgment calls."). In fact, had Lowery not shot Fraire when he did, it is likely that he would have either been severely injured or killed, or that he and the City would now be defending themselves in a suit brought by the survivors of one of the innocent bystanders whom Fraire killed in his desperate attempt to flee the neighborhood to avoid the law.

IV.

The Court Should Deny the Petition Because Petitioners Did Not Present or Argue the Issue of Qualified Immunity Before the Fifth Circuit and Have Therefore Waived Their Right to Challenge That Point on Appeal.

Although Petitioners now ask this Court to resolve the issue of whether qualified immunity is a viable defense to an excessive-force claim, Petitioners failed to even address the issue of Lowery's qualified immunity--let alone whether that defense is applicable in the context of a Fourth Amendment excessive-force claim--in their brief before the Fifth Circuit. Instead, Petitioners focused

solely upon whether Lowery's actions constituted the use of excessive force as defined by the Court under *Graham v. Connor*. Therefore, Petitioners cannot now be heard to complain that the Fifth Circuit erred in applying that defense or in ruling as it did. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 n.5 (1989).

V.

The Court Should Deny the Petition Because Lowery Acted in Self-Defense and Therefore Did Not Use Excessive Force Under the Fourth Amendment.

Finally, and independent of all the foregoing, the Court should deny the Petition because Lowery did not use excessive force as a matter of law. Although Petitioners struggle in vain to "pigeonhole" this case into that portion of *Tennessee v. Garner*, 471 U.S. 1 (1985), which precludes the use of deadly force to stop a non-dangerous fleeing suspect, as the district court correctly noted, "[t]his case is not so simple." (R. Vol. II, pp. 537-38.)

To succeed on an excessive-force claim under the Fourth Amendment, Petitioners must prove all of the following elements:

(1) a significant injury;

(2) which resulted directly and only from the use of force that was clearly excessive to the need; and

(3) the excessiveness of which was objectively unreasonable.

Graham v. Connor, 490 U.S. 386 (1989).

This analysis necessarily involves an inquiry into when and how the seizure occurred, coupled with a balancing of the intrusion upon the individual's rights against the countervailing governmental interests. *Id.* at 396. Additionally, one must consider that Fraire posed an immediate threat to the safety of Lowery and others and was either resisting arrest or avoiding it by flight. *Id.* Finally, whether Lowery's use of force was objectively reasonable must be determined in light of the facts and circumstances presented to him at the time and not with the benefit of 20/20 hindsight as "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396-97. With these standards in mind, the following analysis shows that Lowery did not violate Fraire's Fourth Amendment rights.

First, when Lowery first observed Fraire and Rodriguez, they were drinking and driving on Collins Road, which even Petitioners concede was in violation of Texas law. Fraire was also driving erratically. Thereafter, Fraire turned onto Woodbrook Street and pulled into the first driveway in an attempt to trick Lowery. When this ploy failed, Fraire backed out of the driveway and sped down Woodbrook Street into the heart of a residential neighborhood. In his attempt to flee from Lowery, Fraire then crashed his truck several feet on to a neighbor's lawn and commanded Rodriguez to throw the beer out the window. Fraire then backed up off the lawn, nearly ramming Lowery's car. Seconds later, Fraire sped away—

again trying to flee from Lowery—and turned into Creekmere Court, which Fraire obviously did not realize was a cul-de-sac. Fraire then turned the truck around and headed out of the cul-de-sac. With Lowery now on foot and repeatedly yelling "Police, Stop!" Fraire drove straight at Lowery, showing no sign of either attempting to stop or drive around Lowery. When it became imminently clear to Lowery (as it was to the other eyewitnesses) that Fraire was going to run him down, Lowery fired a single shot at Fraire in self-defense at the last possible moment.[13]

Under these circumstances, *Tennessee v. Garner*, 471 U.S. 1 (1985), confirms that Lowery did not use excessive force under the circumstances:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon- . . . deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Id. at 11-12.

Here, Lowery clearly had probable cause to believe that Fraire posed a serious threat of physical harm to Lowery (and others) because Fraire unquestionably threatened Lowery a with a deadly weapon—his truck. *See* TEX. PENAL CODE ANN. § 1.07(a)(11)(B) (Vernon 1974)

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[13] Lowery does not challenge that Fraire's injury was "severe" under *Graham v. Connor*.

(defining a "deadly weapon" as "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury"); *Parrish v. State*, 647 S.W.2d 8, 10 (Tex. App.—Houston [14th Dist.] 1982, no writ) (holding that "it is well known that an automobile is capable of producing death or serious bodily injury"). *Accord Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992); *United States v. Sanchez*, 914 F.2d 1355 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1626 (1991). Lowery also gave repeated instructions for Fraire to stop, which Fraire simply ignored. Had Lowery not fired when he did, Lowery would have undoubtedly died or suffered severe and permanent bodily injury.

Second, Lowery's use of force cannot be viewed as grossly disproportionate under the circumstances because he acted well within the scope of section 9.51(c) of the Texas Penal Code, which governs a police officer's use of deadly force in Texas. TEX. PENAL CODE ANN. § 9.51(c) (Vernon 1974). This statute provides in pertinent part that:

> A peace officer is justified in using deadly force against another when and to the degree the peace officer reasonably believes the deadly force is immediately necessary to make an arrest, or to prevent escape after arrest, if the use of force would have been justified under Subsection (a) of this section and:
>
> * * *
>
> (2) the actor reasonably believes there is a substantial risk that the person to be arrested will cause death or serious bodily injury to the actor or another if the arrest is delayed.

Section 9.51(a) of the Texas Penal Code provides that the use of force is justified if (1) the police officer reasonably believes the arrest is lawful, and (2) before using force, the officer manifests his purpose to make an arrest and identifies himself as a police officer, if possible or necessary. *Id.* § 9.51(a). Lowery satisfied the requirements of both subsections 9.51(a) and (c) because he observed Fraire drinking and driving and therefore had probable cause to stop and arrest Fraire. Lowery also had more than a reasonable basis to believe that Fraire might cause death or serious bodily injury to himself or others based upon Fraire's flight into a residential neighborhood at a high speed and subsequent repeated attempts to hit Lowery with his truck.

Finally, as discussed above, the amount of force Lowery used was neither excessive nor unreasonable in light of the holdings in *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992), *Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991), *Klein v. Ryan*, 847 F.2d 368 (7th Cir. 1988), and *Young v. City of Killeen*, 775 F.2d 1349 (5th Cir. 1985), wherein the courts rejected section 1983 claims for excessive force under circumstances less threatening to the officers than those here.

Therefore, the Court should deny the Petition because, even under *Graham v. Connor*, Lowery did not violate the Fourth Amendment when he was forced to shoot Fraire to save his own life and preserve the safety of bystanders.

CONCLUSION

For any of the foregoing reasons, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

GARY D. EISENSTAT

Counsel of Record
for Respondent
James W. Lowery, Jr.

4800 NationsBank Plaza
901 Main Street
Dallas, TX 75202
(214) 939-2000

Of Counsel:

FIGARI & DAVENPORT, L.L.P.

ERNEST E. FIGARI, JR.
4800 NationsBank Plaza
901 Main Street
Dallas, TX 75202